No. 15005

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE FLINTKOTE COMPANY, a Corporation,

Appellant,

vs.

ELMER LYSFJORD and WALTER R. WALDRON, Doing Business as Aabeta Co.,

Appellees.

OPENING BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an action for treble damages for violation of the antitrust laws of the United States (R. 4, 17-18). Original jurisdiction of such controversies is vested in the district courts by 15 U.S.C.A. §15 and 28 U.S.C.A. §1337. It was commenced under Section 4 of the Act of October 15, 1914 (38 Stat. 731; 15 U.S.C.A. §15) for an alleged violation of Section 1 of the Sherman Act (Act of July 2, 1890, c. 647, Sec. 1; 26 Stat. 209; as amended, 15 U.S.C.A. §1) (R. 4, 17-18).

The District Court of the United States, Southern District of California, was the proper district court to entertain this action, since The Flintkote Company is qualified to and does transact business in that district (15

U.S.C.A. §15) (R. 41). (Plaintiffs apparently abandoned the claims stated in the First Amended Complaint for injunctive relief under 15 U.S.C.A. §26 and those based upon monopoly prohibited by 15 U.S.C.A. §2.)

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 U.S.C.A. §§1291, 1294(1). No direct review by the Supreme Court may be had in this case.

STATEMENT OF THE CASE.

For convenience and for the purpose of more readily identifying the parties, we shall throughout this brief refer to appellant, The Flintkote Company, defendant below, as "defendant," or "Flintkote," and to appellees Elmer Lysfjord and Walter R. Waldron, plaintiffs below, as "plaintiffs."

Plaintiffs are acoustical tile contractors doing business in the City of Los Angeles under the firm name and style of "aabeta co." They established their present business in December of 1951 or January of 1952. Prior to that time plaintiffs were employed as salesmen by R. W. Downer Company, an acoustical contracting company, in Los Angeles. For many years before their employment by the Downer company, plaintiffs had been employed by other acoustical contractors in the Los Angeles area as applicators or salesmen. Prior to the establishment of aabeta co., neither plaintiff had had an acoustical contracting business of his own, and neither plaintiff had managed or been engaged in the management of an acoustical contracting business.

Flintkote is engaged in the business, among others, of manufacturing building materials, including acoustical tile. Flintkote's acoustical tile is manufactured in the territory

of Hawaii from sugar cane fibre. It is shiped from Hawaii to continental United States by water carrier and is transported from the port of entry directly to the purchaser thereof. Flintkote manufactures a variety of shapes, sizes, thicknesses and styles of cane fibre acoustical tile. It does not manufacture any mineral or incombustible tile. Flintkote's acoustical tile is distributed only through approved acoustical contractors; none is sold through lumber yards or building materials dealers. The number of approved Flintkote contractors in various geographical areas is limited. With the exception of the disputed period during which plaintiffs were doing business in Los Angeles under the claim that they were authorized Flintkote contractors for the Los Angeles area, there have never been more than three approved Flintkote acoustical contractors in that area. During the period involved in this case, R. E. Howard Company, the Sound Control Company (to Spring, 1952), Acoustics, Inc. (from June 3, 1952) and Coast Insulating Products were handling Flintkote tile.

During the summer and early fall of 1951, plaintiffs who were then salesmen for R. W. Downer Company, approached Mr. Robert Ragland, who was then employed by Flintkote as a "sales engineer" for acoustical tile, with regard to plaintiffs being approved as Flintkote acoustical contractors if they were to establish their own business. Mr. Ragland arranged a series of meetings between plaintiffs and Mr. Ragland's superiors at Flintkote, and, in the first part of December, 1951, plaintiffs were approved as Flintkote acoustical contractors. There is a dispute between plaintiffs and Flintkote respecting the scope of that approval. Flintkote employees uniformly testified that it was clearly understood that plaintiffs were authorized to

do business in the San Bernardino-Riverside area only and were prohibited from doing business in the Los Angeles area, except in particular cases after obtaining approval in advance. Plaintiffs contend that they were authorized to do business generally in both the Los Angeles and the San Bernardino areas and take the position that to do business in San Bernardino was a condition of their approval as Flintkote contractors in Los Angeles. Plaintiffs submitted an initial order for a carload of acoustical tile. Plaintiffs established places of business in Los Angeles and San Bernardino. The initial carload of acoustical tile was duly delivered to plaintiffs' place of business in San Bernardino, and paid for by a check drawn on a San Bernardino bank.

In early February, 1952, Flintkote's approved acoustical contractors in the Los Angeles area individually complained to Flintkote that plaintiffs were doing business in the Los Angeles area. Representatives of Flintkote called on these Los Angeles contractors and advised them that plaintiffs were supposed to be doing business only in the San Bernardino-Riverside area and that Flintkote had no knowledge or information respecting the activities of plaintiffs in the Los Angeles area. The Los Angeles contractors were advised that Flintkote would investigate plaintiffs' activities and take such steps as Flintkote deemed to be proper under the circumstances.

At or about February 10, 1952, Mr. Frank S. Harkins, then the manager of Flintkote's Building Materials Division, sent Mr. Ragland out to investigate the activities of plaintiffs. The results of that investigation are embodied in Mr. Ragland's report to Mr. Harkins dated February 14, 1952 (Deft. Ex. "I"). That report stated among other things that plaintiffs had a small warehouse

on Atlantic Avenue in Bell; that they had accepted a contract for an acoustical installation at Torrance and had submitted a bid on a job in Los Angeles. The evidence is in dispute with respect to Mr. Ragland's knowledge of the existence of plaintiffs' place of business in the Los Angeles area. Ragland stated he did not know about this office until he made the investigation on which his report was based. Plaintiffs testified that Ragland knew all about this office long before, and in fact had been there several times. There is no direct evidence that anyone else in Flintkote's organization had any prior knowledge of any of plaintiffs' activities in the Los Angeles area.

On February 19, 1952, Mr. Harkins sent Mr. E. F. Thompson, Building Materials Sales Manager for Flintkote, to tell plaintiffs that because they were doing business in Los Angeles in violation of the express understanding that they would not do so, they were no longer to be considered approved Flintkote acoustical contractors and would no longer be permitted to purchase acoustical tile from Flintkote. Mr. Thompson, after having Mr. Ragland advise plaintiff Lysfjord by telephone of the impending visit, proceeded to plaintiffs' Los Angeles office, taking with him Mr. Ragland and Mr. Browning Baymiller, Flintkote's Assistant Building Materials Sales Manager. There is some dispute as to what was actually said at the meeting of Messrs. Lysfjord, Waldron, Thompson, Baymiller, and Ragland at plaintiffs' Los Angeles place of business (although it is admitted that Thompson gave as a reason for the cut off the fact that plaintiffs were operating in Los Angeles), but the upshot of the meeting was that plaintiffs could no longer purchase acoustical tile from Flintkote, except that Flintkote agreed

to supply tile in quantity sufficient to fulfill any outstanding commitments of plaintiffs.

Flintkote filled two small additional orders for acoustical tile submitted by plaintiffs pursuant to Flintkote's aforesaid agreement.

Plaintiffs did not make any other arrangement to obtain acoustical tile directly from the manufacturer thereof or to be approved as acoustical contractors by any manufacturer of acoustical tile. Plaintiffs contend that they were unable to make such an arrangement. Flintkote contends that there is no evidence of such inability.

Plaintiffs paid more for such acoustical tile as they purchased from persons other than Flintkote than the Flintkote carload prices for similar acoustical tile prevailing at the time such purchases were made.

This action was commenced on July 21, 1952. The case came on for trial before a jury May 4, 1955.

Plaintiffs introduced evidence tending to prove the existence of a conspiracy in restraint of trade among the acoustical contractors in the Los Angeles area. Flintkote objected to this evidence on the ground that no connection with Flintkote was shown. The evidence consisted of the so-called "take-off sheets" which plaintiffs had obtained during their employment by the R. W. Downer Company (Pltf. Exs. 18 through 28) and certain files and records obtained from the other acoustical contractors (Pltf. Exs. 29 through 35). Plaintiffs also testified to certain conduct of the other contractors which might indicate a conspiracy or agreement among them. It may be inferred that the purpose of the conspiracy among the contractors was to fix prices and allocate jobs among them for public works.

Plaintiffs' theory was that the other contractors wished to protect themselves and their price-fixing and job-allocating arrangement from competition by plaintiffs and, to that end, asked Flintkote to refuse to deal with plaintiffs. Flintkote then, according to plaintiffs' theory, joined with the contractors and, in furtherance of the conspiracy, refused to deal further with plaintiffs. Flintkote contends that no evidence was introduced tending to connect Flintkote with any conspiracy which may have existed among the contractors.

Flintkote's position is that it in good faith approved plaintiffs as Flintkote acoustical contractors in the San Bernardino-Riverside area upon the express condition that plaintiffs do no business in the Los Angeles area. In contravention of that express condition, plaintiffs in fact established a place of business in Los Angeles. Flintkote unilaterally determined that such conduct on the part of plaintiffs made them undesirable customers and Flintkote thereupon refused to deal further with plaintiffs. Flintkote had no knowledge or information respecting the existence of any conspiracy of any kind among the acoustical contractors in Los Angeles and did not join in or consciously act in furtherance of any such conspiracy. The Los Angeles Flintkote contractors complained to Flintkote about plaintiffs because they had been advised by Flintkote that Flintkote tile would be sold to only three contractors in Los Angeles, but Flintkote did not agree with any acoustical contractor to refuse to deal with plaintiffs or to take any other action with respect to them.

Flintkote moved for directed verdict at the close of plaintiffs' case and at the close of all the evidence on the ground that no evidence had been introduced tending to show Flintkote's knowledge of or participation in any con-

spiracy. In connection with those motions Flintkote moved to strike all evidence of acts or conduct of the contractors on the ground that they could not be attributed to and were not binding upon Flintkote, absent a showing that Flintkote and the contractors were co-conspirators. Said motions and Flintkote's timely motion for judgment notwithstanding the verdict were denied.

Plaintiffs were permitted to testify over Flintkote's objections respecting certain declarations allegedly made to plaintiffs by Mr. Ragland. Those declarations were entirely historical in nature. There was no showing that Mr. Ragland was authorized by Flintkote to make the declarations in question or that they were made in the course of his performance of any duties for his employer or were in any way connected with his employment. The declarations related to certain contacts between Flintkote and some of the contractors, including an alleged meeting at which threats of boycotting Flintkote were supposed to have been made. This testimony was detrimental to and contrary to the position taken by Flintkote at the trial. (Mr. Ragland denied making the declarations, and all the persons said to be participants in the alleged contacts denied that such incidents occurred.) Plaintiffs' testimony in this regard was allowed to remain in evidence over repeated motions to strike.

Certain evidence respecting plaintiffs' damages was introduced over Flintkote's objections that the same was speculative, without foundation in fact, palpably erroneous in some instances, and in part relating to a period in

excess of the maximum period for which plaintiffs might be entitled to damages in this action. Flintkote's position was that plaintiffs were entitled to recover damages, if at all, only with respect to injury sustained by reason of the failure of Flintkote to supply tile to plaintiffs prior to July 21, 1952, the date of filing the complaint in the action. Plaintiffs took the position that they were entitled to recover damages resulting from the failure of Flintkote to supply tile to them up to the time of trial, and much of the evidence related to the period proposed by plaintiffs. Flintkote requested jury instructions regarding damages in accordance with its theory. The Court instructed in accordance with plaintiffs' theory.

Flintkote contends that the court's instructions to the jury were erroneous in several particulars which are reviewed in detail in the Specification of Errors and in the argument, *infra.*

The action was originally commenced against all of the allegedly conspiring acoustical contractors, the Acoustical Contractors' Association of Southern California, and Flintkote. Prior to the trial of the action against Flintkote, the defendants other than Flintkote paid the sum of $20,000 to plaintiffs as consideration for a covenant not to sue and the dismissal of the action as to them. The legal effect of the receipt of the $20,000 by plaintiffs was withdrawn from the jury and submitted to the Court pursuant to stipulation. Flintkote's position was and is that the $20,000 reduced the actual damages sustained by plaintiffs by that amount and should be deducted from the total actual damages assessed by the

jury ($50,000) before trebling the same. Plaintiffs took the position that at most the $20,000 should be credited against a judgment for treble the actual damages assessed by the jury. The court credited said $20,000 against the judgment for trebled damages.

The Court fixed the fee of plaintiffs' attorney at $25,000. Flintkote contends that such sum is unreasonable on the evidence elicited in support there of (consisting solely of the Petition for Attorney's Fees and Costs and Exhibit A thereto [R. 105-113]). Of course if a new trial is ordered, the allowance of attorney's fees must be vacated.

The jury returned a verdict in favor of plaintiffs and fixed the damages at $50,000. The Court rendered judgment in the sum of $155,165.70, consisting of treble the damages found by the jury, $25,000 attorney's fees, $165.70 costs, less the $20,000 received from the parties to the covenant not to sue.

Flintkote made a motion for a new trial on four grounds:

(a) Substantial and prejudicial errors of law were committed in the course of the trial.

(b) The verdict of the jury is not supported by legally sufficient evidence.

(c) The verdict of the jury is against the weight of the evidence.

(d) The damages assessed by the jury are excessive.

The motion was denied. In so doing we respectfully submit the Court abused its discretion. Our position in this connection is set out in the Specification of Errors and the Argument.

SPECIFICATION OF ERRORS.

1. The court erred in denying defendant's motion to set aside the verdict of the jury and to enter judgment in favor of defendant and against plaintiffs in accordance with defendant's motion for directed verdict at the close of all of the evidence upon the ground that plaintiffs had not introduced any substantial evidence tending to show that The Flintkote Company had done any act or acts in violation of the antitrust laws.

2. The court erred in admitting evidence relating to an alleged conspiracy among the acoustical contractors, formerly defendants in this action, to fix prices and allocate jobs for public works in the Los Angeles area, over defendant's objection that no connection of defendant Flintkote with such a conspiracy has been proved and in refusing to strike that testimony on motion of defendant Flintkote on the same ground. The evidence thus erroneously admitted consists of plaintiff's exhibits 18 through 37, all testimony in any way connected with any of those exhibits, and other testimony respecting the activities of the acoustical contractors, otherwise than in connection with or in direct relationship to defendant Flintkote. That testimony is too voluminous to set forth at length, since it covers over a hundred pages of the record. It appears at pages 302-335, inclusive (Waldron); 409-432 (various documents and files produced); 491-539 (Lysfjord); 592-594, inclusive (Lysfjord resumed), and 1181. Defendant's objections to this testimony appears at 278 through 294, 304, 309, 319, 321, 330, 332, 334, 492-493, 498, 504-505, 506, 508, 525, 532, 533, 536 and 1181. Defendant moved to strike that evidence at 717.

3. The court erred in admitting into evidence over objection and in failing to strike from the record upon

motion the testimony of plaintiff Waldron respecting alleged declarations by Robert Ragland regarding activities of Gustave Krause (Crouse) (R. 259, 262-63, 266) and activities of R. E. Howard (R. 269-70). That testimony and defendant's objections thereto are as follows:

> "Q. What did Mr. Raglund [*sic*] tell you? A. He was telling us that Mr. Gus Crouse—Coast Insulating Products—came down and was particularly angry, and that he got out of line—
>
> Mr. Black: I would like at this time to interpose an objection, if the court please, on the ground that Mr. Ragland is not shown to have authority to make any statements binding on the Flintkote Company, and that the evidence proffered is incompetent, irrelevant and immaterial. There is no authority of Mr. Ragland to make statements of that sort of an historical character as to what had happened which has been shown." (R. 259.)
>
> * * * * * * * *
>
> "Q. Will you relate that conversation you had with Mr. Ragland you started to talk about? A. Yes. He was telling me that Gus Crouse of the Coast Insulating Products, a distributor of theirs—
>
> Q. What position, if you know, did Gus Crouse hold with Coast Insulating? A. He was general sales manager. At least, he was at that time.
>
> Q. State what Mr. Ragland told you. A. Mr. Ragland said that he came to their office—or his office and his desk, and got so abusive that he had to tell him he would have to leave him and when he could be more rational he would return.
>
> Now, he was telling him that they wouldn't stand for us, the aabeta co., selling acoustical title.

Q. Did you say—

Mr. Black: Just a moment. I wish the record to show we move to strike this answer in pursuance of our objection." (R. 262-63.)

* * * * * * * *

"Q. (By Mr. Ackerson): You were talking about Mr. Crouse's conversation with Mr. Ragland. Did he relate any further part of the conversation, or was that all? A. That is as I remember it at the moment, and anyway, Bob told me that he had to leave Mr. Crouse and then come back at a later date when he was quieted down." (R. 266.)

* * * * * * * *

"Q. (By Mr. Ackerson): Then at this conversation with Mr. Ragland, did he name other acoustical tile contractors that had approached him concerning your doing business? A. Yes, he said a Mr. R. E. Howard—

Mr. Black: It will be understood our objection goes to this?

The Court: Yes.

The Witness: —was down there complaining, also.

Q. (By Mr. Ackerson): And what did he say that Mr. Howard said, if anything? A. I don't know any exact words, except he mentioned that they were trying their best to force an issue to stop our operations." (R. 269-70.)

Defendant moved to strike the aforesaid testimony at the close of plaintiffs' case (R. 717), and rather extensive argument in support of that motion appears at pages 721 to 733 of the Record.

4. The court erred in admitting into evidence over objection and in failing to strike from the record upon

motion the testimony of plaintiff Lysfjord respecting alleged declarations by Robert Ragland regarding an alleged meeting among Sidney Lewis, R. E. Howard, Gustave Krause, and Charles Newport (R. 474-76), and an alleged conversation between Ragland and Krause (R. 476-480). That testimony and defendant's objections thereto are as follows:

"Q. What was said by Mr. Ragland?

Mr. Black: That, if the court please, is objected to on the ground that this question calls for the eliciting from this witness of some narrative of a past event, that the witness presumably is about to state that Mr. Ragland told him about other people making, having made complaints to the Flintkote Company.

. . .

Mr. Black: The principle we are relying on is a simple point of law of agency. This man is shown to have been an employee of the Flintkote Company. To be sure, there is absolutely no evidence as to the extent of his authority.

The question seems to call for a narration of a past event; not anything done by the declarant himself. It comes under the general rule that Wigmore states in very simple terms as follows:

'Declarations or admissions by an agent on his own authority and not accompanying the making of a contract or the doing of an act on behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being a part of the res gestae and are not admissible in evidence but come within the general rule of law excluding hearsay evidence, being but an account or statement by an agent of what is past or been done or admitted to have been done.

Not a part of the transaction but only statements or admissions respecting it.'

That is Section 1078 of Wigmore's text, Vol. 4.

Again on the same principle, Fletcher on Corporation, Section 735, pages 734 to 735:

'It is elementary that an agent cannot bind his principal by declarations which are merely historical and which have no connection with any transaction then being conducted by him, with authority, for his principal. The principle of the exclusion of such evidence is the same as obtains in the ordinary relationship of principal and agent.

'The statements of the latter are inadmissible to affect the former unless, in respect to a transaction in which he is authorized to appear for the principal and he has no authority to bind his principal by any statements as to bygone transactions. Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make, or to statements by him which constitute part of the transaction which is at issue between the parties.'

Now, we submit in that situation it calls for pure hearsay. No proper foundation has been laid. And that the ordinary rule of principal and agent is applicable to this situation, and the authority of this agent doesn't extend to the making of declarations of past events." (R. 468-471.)

* * * * * * * *

(Extended argument R. 471-474):

"The Court: Objection overruled.

Q. (By Mr. Ackerson): Will you state your conversation with Mr. Ragland on that occasion in January or February prior to the termination meeting? A. Well, Mr. Ragland came into the office,

met me at the office, and mentioned that in his words, things were getting a little bit hot. He said that pressure that you were talking about is starting to show up. The competitors of yours in the field are beginning to pick up your figures and the fact that you are bidding against them around in this general area.

The manager of Howard Company, Mr. Howard, and Mr. Gustave Krause from Coast Insulating, a Sidney Lewis of Flintkote Company—I believe one of the principals there—and Mr. Newport, all had a meeting.

Q. Who is Mr. Newport? A. He is a principal of Coast Insulating. All of these are Flintkote dealers, incidentally.

The Court: Are you telling this as a conversation?

The Witness: I am saying what Mr. Ragland told me.

The Court: Very well.

The Witness: That they had this meeting objecting very strenuously to the fact that we were in business, the aabeta company was in business.

One of the very strongest statements was from Mr. Newport, saying that he would boycott, I believe the word was, all of Flintkote's materials and see that it wasn't used in the area, and he was willing to spend $40,000 or $50,000 to do it.

Mr. Black: Just one moment.

I renew our objection, if the Court please. It is now perfectly apparent that this is a narration of alleged events that are purported to have occurred in the past, that it is pure hearsay under the law and the well-settled rule of substantive law of principal and agent, and that the witness is attempting to relate something that has nothing to do with any

duty that Ragland was then performing but merely purports to be something that Ragland told him as to some events that had occurred sometime prior.

The Court: The witness having answered, you want to make that as a motion to strike?

Mr. Black: I make that as a motion to strike.

The Court: If so expansive a tort as conspiracy has a res gestae which runs over the period of the conspiracy, suppose it does, this would be part of the res gestae.

Mr. Ackerson: It would be part of the res gestae.

The Court: And would be admissible then. When I say it would be part of, it would be evidence of, not undertaking to make it binding or to indicate what weight should be given to it.

The motion is denied.

Q. (By Mr. Ackerson): Did Mr. Ragland state the conversation of Mr. R. E. Howard on this occasion? A. Only that he objected very violently. I don't recall the exact words.

Q. What about any statement to Mr. Ragland by Mr. Gustave Krause? A. I don't recall that he said any more at that time. However, there was another meeting where Mr. Gustave Krause did state very violently what he thought of us going into business.

Q. Who told you that?

Mr. Black: That is objected to.

Mr. Ackerson: Yes, you may strike that.

The Court: Yes. Strike the part of the answer that said that he state violently.

You can't characterize a statement as expansive, violent, kindly, gratuitously, gratefully or anything else; you have to just tell us what was said and

the jury will have to decide with what motive it was said.

Q. (By Mr. Ackerson): Did Mr. Ragland relate this conversation to you by Mr. Krause? A. Yes, sir.

Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?

Mr. Black: It will be understood of course that our objection runs to all of this?

The Court: Are you speaking to the objection you urged last week?

Mr. Black: Yes, the objection that it is pure hearsay, that there is no authority in the agent to narrate past events.

The Court: I will understand it but it is just the nature of things that ultimately the examination will shift to something else and sometimes these transitions are so gradual that it is a little difficult to keep track, but I understand that it runs to this one.

Mr. Black: I don't want to keep interrupting, if the Court please, but I do want our record perfected on this point.

The Court: Surely.

The Witness: What was the question again?

Mr. Ackerson: Will you read the question, Mr. Reporter?

(The question referred to was read by the reporter as follows: 'Q. Will you state what Mr. Ragland told you, what he said as nearly as you can in substance?')

Mr. Ackerson: That is concerning Ragland's conversation with Mr. Krause.

The Witness: Mr. Ragland told me that Mr. Krause came into the office and talked—

Q. (By Mr. Ackerson): Into the Flintkote office? A. Into the Flintkote office, and talked so loudly to Mr. Ragland and pounded on the desk a little bit that Mr. Ragland got up and left and told Mr. Krause that if he couldn't talk as a gentleman he didn't want to talk to him any more, and until such time as he could behave as a gentleman, that he, Ragland, would come back and talk with him.

Q. Did Mr. Ragland say what Mr. Krause was talking about? A. He was objecting very strenuously to the aabeta company being in business.

The Court: You cannot say he was objecting. That is a conclusion. You have to tell us what was said and then the jury can decide whether he objected to something or applauded, or something in between.

The Witness: Well, I don't know how else to say it because that was what he was doing.

Mr. Black: You weren't there.

The Court: That is what he was doing? You tell us what he said. Of course you cannot remember it word for word, but you can say in substance he said A, B, C, D, and so forth, and go ahead and relate the substance of the conversations. Then it will be up to the jury to determine whether that was an objection or not.

The Witness: I don't know quite how to answer that.

Q. (By Mr. Ackerson): Did Mr. Ragland—are you relating Mr. Ragland's words to you as far as the word 'objection' goes, or did Mr. Ragland say Mr. Krause used other words? A. He used the word 'objected.' He said, 'I object very much to the aabeta company being in business, in competition with us, using the same type of title.' That is why I keep saying 'objected.' That is the word he used.

The Court: If that is the word he used, that is all right. I thought you were using a word which you thought his words added up to.

The Witness: Oh, no. Mr. Krause very definitely said those words, as I recall what Mr. Ragland told me, that he objected very strenuously to the aabeta company. He used the words 'I object to the aabeta company being in business here in the Los Angeles area, using the same type of acoustical tile that we are a dealer for.'

And that is the time when Mr. Ragland decided to leave, not wanting to listen to the loud conversation, and he told me it was loud. That is not my assumption. He said he didn't like it, so he left. He left for about 10 minutes as I understand it—or I was told rather—and then went back and talked further with Mr. Krause. What they talked further about, I do not know." (R. 474-80.)

Defendant moved to strike the aforesaid testimony at the close of plaintiffs' case (R. 717) and rather extensive argument in support of that motion appears at pages 721 to 733 of the Record.

5. The court erred in failing adequately to instruct the jury that it could return a verdict for plaintiffs only if it found that defendant Flintkote was a party to an unlawful conspiracy in restraint of interstate commerce which injured plaintiffs, and in failing adequately to instruct the jury that defendant Flintkote was the only defendant in the case. The court's instructions in several instances indicate that a verdict for plaintiffs could result if the jury found an unlawful conspiracy among the acoustical contractors who were formerly defendants in the case without regard to whether defendant Flintkote

participated therein. The particular instructions claimed to be erroneous in this respect are as follows:

"The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. But under the antitrust laws it cannot do so if there has been a conspiracy." (R. 1236.)

* * * * * * * *

"Now, you have noted, as I read that, that I mentioned the defendants, but there is only one defendant here. This Complaint, upon which the case is tried and from which I have just read to you, was filed against many defendants. What has happened in the case with respect to the others is not of any concern to you. We are trying the case here today as to this one defendant.

"The defendants, however, are, L. D. Reeder Co. of San Diego; R. E. Howard Company; The Harold E. Shugart Company, Inc.; R. W. Downer Company; Coast Insulating Products; A. D. Hoppe, doing business under the fictitious name and style of The Sound Control Company; The Paul H. Denton Co., Acoustics, Inc.; L. E. Reeder; R. E. Howard; G. H. Morris; Roy Downer, Jr.; Carroll Duncan; Charles L. Newport; Gustave Krause; Paul H. Denton; Acoustical Contractors Association of Southern California, Inc.; The Flintkote Company. It is charged in the Complaint that these defendants conspired, among themselves and with others, to violate the Sherman Act." (R. 1239.)

* * * * * * * *

"That if The Flintkote Company acted in concert with any one or more of the other defendants here, and the acting in concert was in violation of the law, which I will now read to you, then the conspiracy would be made out." (R. 1241-42.)

* * * * * * * *

". . . I charge you that the combination is illegal and your verdict should be in favor of the plaintiffs as to each defendant whom you find to have knowingly participated therein." (R. 1245.)

* * * * * * * *

"If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, . . ." (R. 1245.)

* * * * * * * *

"The success or failure of the conspiracy is immaterial, but before the defendants may be found to have engaged in such it must be shown that they were active in attempting to further the ends of the conspiracy." (R. 1240.)

* * * * * * * *

"This means, in a practical way for you, that if you find that Mr. Ackerson was right in his arguments here, and the evidence does show that there was a conspiracy, then even so you cannot undertake to punish it. Your duty is not, if you find that the plaintiffs are right, to take steps to bring about punishment or redressment of the injury which the public suffered, but instead will be to compensate the plaintiffs for the loss which they have sustained." (R. 1250.)

The court was fully advised that Flintkote objected to all instructions which referred to "defendants" or which did not clearly indicate that only Flintkote's participation in an unlawful conspiracy could form the basis of a verdict for plaintiffs. This is fully illustrated by the following excerpts from the Record:

> "Mr. Black: I think in that same connection it now appears that it would be almost imperative that plaintiffs' instructions be recast. . . . Because in some instances we even have a situation where you tell the jury that they could find against some but not all the defendants, which, of course, now becomes—" (R. 155-56).

> "Mr. Black: . . . We have a good many objections to your instructions, Mr. Ackerson." (R. 1228.)

> "Mr. Black: One other observation. I think it is more a matter of confusion than error. In one of the old instructions there were several defendants in the case, which was given, that stated the jury can bring in a verdict against any defendant they find guilty, which is inappropriate in this action. It might tend to confuse. I think that was inadvertently given that way.
>
> The Court: I think I was reading Judge James' instructions at the time." (R. 1258.)

6. The court erred in instructing the jury that the reasonability or unreasonability of any restraint of trade which the jury might find was unimportant and in failing to instruct the jury that only unreasonable restraints of trade are prohibited by the law and that the reasonability of any restraint found by the jury was a question for

the jury to decide. The particular instructions which it is claimed were erroneous are as follows:

> "The Flintkote Company or anyone else engaged in private enterprise may select its own customers, and in the absence of an illegal contract, combination or conspiracy may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever. But under the antitrust laws it cannot do so if there has been a conspiracy." (R. 1236.)
>
> * * * * * * * *
>
> "The elimination of competition in interstate commerce by a corporation or by a combination or group of corporations, or competitors, controlling a substantial part of the acoustical tile industry, is an undue, unreasonable and illegal restraint under the Sherman Act, if those parties act in concert by conspiracy, without regard to any economic or financial reasons or advantages derived by the combination or group individually or collectively from such action.
>
> "It is not a question as to what extent competition was affected nor is it a question how reasonable or unreasonable from an economic point of view the restraint of competition may have been. What the law condemns is the power and exercise of such power on the part of an organized group to eliminate competition, and for that reason the law condemns and brands as illegal all attempts to eliminate competition by an organized group, such as has been hypothetically described here." (R. 1244-45.)
>
> * * * * * * * *
>
> "The law condemns the exercise or the intent to exercise by any person or by combination or group of two or more persons to eliminate competition among or between acoustical tile contractors, so, as

I have stated, if you find such a combination or group and the members of the same had the power to eliminate competition and acted together for that purpose, then I charge you that the combination is illegal and your verdict should be in favor of the plaintiffs as to each defendant whom you find to have knowingly participated therein." (R. 1245.)

* * * * * * * *

"If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, provided the evidence actually shows preponderantly that plaintiffs were damaged by such acts and conduct." (R. 1245-46.)

* * * * * * * *

"If you find that the defendant, The Flintkote Company, knowingly agreed with one or more of the acoustical tile contractors, named the defendants in this case, to restrict or prevent plaintiffs from competing with such acoustical tile contractors, you are instructed this would be a violation of the law and if you find that this violation resulted in damage to the plaintiffs' business or property, your verdict should be for the plaintiffs in the amount you find they have been damaged." (R. 1246-47.)

* * * * * * * *

"This means, in a practical way for you, that if you find that Mr. Ackerson was right in his arguments here, and the evidence does show that there was a conspiracy, then even so you cannot undertake to punish it. Your duty is not, if you find that the plaintiffs are right, to take steps to bring about

punishment or redressment of the injury which the public suffered, but instead will be to compensate the plaintiffs for the loss which they have sustained." (R. 1250.)

No objection was made to these instructions at the time when they were given. The court was, however, fully aware both of the correct law in this matter and of defendant's position in this regard. At the commencement of the trial, defendant submitted the following instructions dealing with this point:

"Defendant's Instruction No. 26.

"Before you can conclude that a combination agreement or concert constitutes an unlawful conspiracy or concert you must determine that its inherent tendency is substantially to lessen, hinder, or suppress competition in the channels of trade or commerce or to monopolize trade or commerce." (R. 68.)

"Defendant's Instruction No. 27.

"Merely because a contract, combination, agreement or concert results in a restraint of trade or commerce, it does not follow automatically that it is of an unlawful nature. Only unreasonable restraints of trade or commerce are condemned by the law." (R. 68.)

"Defendant's Instruction No. 28.

"Whether or not a particular restraint is reasonable or unreasonable is a question of relation and degree." (R. 69.)

"Defendant's Instruction No. 29.

"The true test of the legality of a restraint of trade is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition

or whether it is such as suppresses or destroys competition. In arriving at your determination of this question you must consider the facts peculiar to the business to which the restraint is applied, the nature of the restraint, and its actual effect." (R. 69-70.)

None of defendant's above-quoted instructions was given.

7. The court erred in giving to the jury conflicting instructions regarding the necessity of a finding of injury to the public as a prerequisite to a verdict for plaintiffs. Although the court instructed the jury correctly in this regard at page 1249 of the Record, it also gave many instructions which stated or intimated that a verdict could be rendered for plaintiffs without a finding of public injury. These instructions are set out *totidem verbis* in Specification 6, *supra*.

Defendant did not specifically object to this error at the time when the instructions were given. However, defendant's position in this regard was clearly set forth and was before the court in defendant's proposed instructions numbered 30, 31, and 32 as follows:

"Defendant's Instruction No. 30.

"Before plaintiffs are entitled to recover damages for violations of the antitrust laws they must prove some appreciable harm to the general public in the form of undue or unreasonable restriction of trade and commerce as a result of a wrongful contract, combination, conspiracy, monopoly, or attempt to monopolize." (R. 70.)

"Defendant's Instruction No. 31.

"The element of public injury may not be satisfied by anything less than proof of a substantial effect on the interstate commerce concerned." (R. 71.)

"Defendant's Instruction No. 32.

"The general public interests have not been injured within the meaning of the law unless the restraint imposed brought about or was reasonably calculated to bring about an increase in prices to the consuming public, a diminution in the volume of merchandise in the competitive markets, a deterioration in the quality of the merchandise available in the channels of commerce, or a similar consequence in the free flow of interstate commerce." (R. 71-72.)

In fact, the court in its instructions to the jury gave the substance of defendant's Instructions Nos. 30 and 32 (R. 1249).

8. The court erred in failing to instruct the jury substantially as set forth in Defendant's Instructions Nos. 24, 25, and 33, which gave specific examples of applications of the law to the testimony in the case and under which the testimony could be construed in such manner as to compel a verdict for defendant. Those instructions were as follows:

"Defendant's Instruction No. 24.

"If you find that plaintiffs, contrary to a condition imposed by The Flintkote Company, invaded a trade territory of established dealers handling Flintkote products, you are instructed that that would be an ample reason of a substantial business character for The Flintkote Company to have refused to make further sales of acoustical tile to plaintiffs. If you find that The Flintkote Company refused to sell acoustical tile to plaintiffs for that reason and not as a consequence of a knowing participation in an unlawful conspiracy, then The Flintkote Company cannot be liable in any respect to plaintiffs for such refusal to sell." (R. 66.)

"Defendant's Instruction No. 25.

"Even if you find that The Flintkote Company declined to sell or discontinued selling acoustical tile to plaintiffs as the result of pressure brought upon The Flintkote Company by other persons, The Flintkote Company would not thereby participate in any unlawful conspiracy if it did not know that such conspiracy existed; and you cannot infer knowledge of such conspiracy solely from the fact, if it be the fact, that The Flintkote Company yielded to such pressure." (R. 67.)

"Defendant's Instruction No. 33.

"There is nothing inherently unlawful in a manufacturer's establishing the policy of limiting the number of distributors in a given area. If you find that such a policy was established by The Flintkote Company for the purpose of promoting good relations with its own customers and furthering its own legitimate business interests and was not done for the purpose of bringing about an unlawful restraint of trade or the creation of a monopoly, there would be no violation of the antitrust laws in the establishment or maintenance of such a policy by The Flintkote Company." (R. 72-73.)

No specific objection was made to the failure to give those instructions at the time when the court instructed the jury. Those requested instructions were, however, before the court at all times during the trial, and it was clear at all stages of the trial that defendant's defense rested on the theories expressed in those instructions. See Answer of The Flintkote Company to First Amended Complaint (R. 45-47), argument of defendant's counsel (R. 748-53), Defendant's Opening Statement (R. 773-77), argument of defendant's counsel (R. 286-89).

9. The court erred in failing to instruct the jury regarding the burden of proof substantially as set forth in Defendant's Instruction 14 (New), which reads as follows:

> "Defendant's Instruction No. 14 (New).
>
> "In this case plaintiffs have the affirmative of all issues and they must carry the burden of proving all the issues. This 'burden of proof' means that if no evidence were given on either side of an issue, your finding as to it would have to be against the plaintiffs. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence, as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the plaintiffs." (R. 57-58.)

Defendant's objection in this regard is found in the following colloquy:

> "Mr. Doty: For the record, I think we should have our 14 new on burden of proof, which said that the plaintiff has the burden of proof on all issues, and that in the event he does not sustain the burden of proof, they are to find for the defendant. I don't think that was ever stated.
>
> The Court: There were many instructions submitted on that particular issue. I selected one and did not wish to repeat." (R. 1257.)

10. The court erred in failing to instruct the jury regarding the burden of proof of damages substantially as set forth in Defendant's Instruction 42, which reads as follows:

"Defendant's Instruction No. 42.

"Even if plaintiffs convince you that The Flintkote Company has engaged in conduct prohibited by the antitrust laws and which has resulted in injury to the public, that, by itself, does not give plaintiffs the right to recover damages. Plaintiffs must go still farther, and the burden of proof is upon them to show some real and actual pecuniary loss or damage by reason of such unlawful conduct. There is no duty imposed by the law upon a defendant to show that its acts have not worked injury to a plaintiff. On the contrary, the duty and burden of proving injury to their business or property is imposed by law upon the plaintiffs, and, unless they prove this fact of injury to their business or property as a result of such conduct by a preponderance of the evidence, they cannot recover damages." (R. 79-80.)

Defendant's objection in this regard is found in the following colloquy:

"Mr. Doty: I noted our 42 we thought should be given.

The Court: I understood that was in the series." (R. 1259.)

11. The court abused its discretion in failing to grant defendant a new trial on one or more of the following grounds:

a. the verdict was not supported by legally sufficient evidence;

b. the verdict was against the weight of the evidence;

c. the damages fixed by the jury were excessive.

12. The court erred in instructing the jury with regard to the period and acts for which damages were recoverable and in failing to instruct the jury in that regard

substantially as requested by defendant. The court instructed the jury as follows:

> "Plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to the time of the beginning of this trial." (R. 1254.)

Defendant's objection is contained in the following colloquy:

> "Mr. Doty: We believe that our instructions 46-A through 46-F should be given. It is on an entirely different theory of damages from the one stated, but, for the record, we would like to insist that they be given.
>
> The Court: The insistence is noted and I have given them as far as I feel that I properly can.
>
> Mr. Doty: I take it that it is sufficient if we specify 46-A through 46-F, without specifying which is new, because, obviously, we only want the latest version of those.
>
> The Court: The court will protect you by saying that I understand the exception and I deliberately and knowingly decline to give all the instructions just mentioned." (R. 1257.)

Defendant's requested instructions 46(a) through 46(f) as they existed at the time when the court instructed the jury are as follows:

> "Defendant's Instruction No. 46(a)(New).
>
> "In the event you should determine that under the law as stated to you plaintiffs are entitled to damages in some amount, you will guide yourself in the computation of that sum by the following rules:

"(a) Plaintiffs could not have sustained recoverable damages by reason of acts for which The Flintkote Company may be responsible prior to February 19, 1952, that being the date that The Flintkote Company advised plaintiffs that they would no longer sell acoustical tile to them except to cover plaintiffs' outstanding commitments." (R. 83.)

"Defendant's Instruction No. 46(b)(c).

"(b) Plaintiffs would be entitled to recover for injuries sustained prior to July 21, 1952, that being the date this action was instituted.

"(c) Plaintiffs would be entitled to recover for injuries sustained subsequent to July 21, 1952 only in the event that the preponderance of the evidence convinces you that such injuries occurred as a consequence of acts done before July 21, 1952. In other words, you are not to concern yourselves with acts, including refusals by The Flintkote Company to sell plaintiffs acoustical tile, which occurred after July 21, 1952; plaintiffs are not entitled to recover damages in this action for injuries, if any there were, resulting from such acts." (R. 84.)

"Defendant's Instruction No. 46(d)(New).

"(d) Therefore, plaintiffs would be entitled to recover only for damages sustained, if any, as a consequence of acts for which The Flintkote Company is responsible and occurring between February 19, 1952, and July 21, 1952." (R. 85.)

"Defendant's Instruction No. 46(e).

"(e) Plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952 to July 21, 1952." (R. 86.)

"Defendant's Instruction No. 46(f).

"(f) Plaintiffs cannot recover in this action any damages which may have resulted from their inability to obtain acoustical tile from the defendant Flintkote on a direct basis during any period commencing on or after July 21, 1952." (R. 87.)

13. The Court erred in admitting into evidence and failing to strike from the record upon motion Plaintiffs' Exhibits 38, 39, and 43 and certain testimony of plaintiffs in connection therewith. The testimony objected to is that of plaintiff Lysfjord appearing at pages 594-99, 600-603, 622-31 of the Record, and of plaintiff Waldron appearing at pages 680-85, 686-92 of the Record.

Plaintiffs' Exhibit 38 is a statement purporting to be a tabulation of estimated damages sustained by plaintiff Waldron, which is in words and figures as follows:

Walter Waldron—		
Recap of Loss Figures:		
Commissions & Expected profits 7 months @ $2,500.00 per month	$17,500.00	
San Bernardino Expense	$ 960.00	
Total	$18,460.00	
Less ½ of 1st year actual profit	$ 1,215.00	
Net total lost	$17,245.00	
Actual cost of tile purchased	$87,808.97	
Estimated cost from distributor Based upon 17% overpayment for tile	$66,503.40	($75,050.40)
Total overpayment due to restraint of adequate supply	$21,305.57	($12,758.57)
Share of above chargeable to Walter Waldron	$10,652.78	($ 6,379.28)

Average Earnings—R. W. Downer Co.	$ 1,250.00	
Approximate profit based upon a 30% mark-up divided 10% for overhead; 10% salesman commission; 10% profit for company.		
Approximate profit for Walter Waldron as an owner in business for himself would be:		
$1,250.00 as salesman's profit		
$1,250.00 as owner's profit	$ 2,500.00 per month	
Income for first seven months equals 7 x $2,500.00 or		$17,500.00

San Bernadino [*sic*] Expenses:		
Rent @ $60.00 per month for 1 year	$ 720.00	
Promotional Expense & advertising	500.00	
Utilities & Trucking expense	700.00	
	$ 1,920.00	
Share of expense by Walter Waldron		$ 960.00
Total Loss by Walter Waldron		$18,460.00

Approximate cost of 1 carload of tile is $6,000.00; Average sales price of 1 carload of tile is $18,000.00; approximately 30% of $18,000.00 is gross profit. Thus the approximate gross profit on 1 carload of tile is $5,400.00.	
During the first year of business an average of one carload of tile per month would result in a gross profit of $64,800.00. This gross profit would be divided up as follows:	
Overhead ⅓ of $64,800—$21,600.00	
Profit—Walter Waldron —$21,600.00	
Profit—Elmer Lysfjord —$21,600.00	

Based upon 1 carload per month during 1952, Walter Waldron would have a profit of	$21,600.00
Based upon 1½ carloads per month during the second year the profit to Walter Waldron would be	$32,400.00
Based upon 2 carloads per month during the third year the profit to Walter Waldron would be	$43,200.00

Total estimated profits during the three year period would have been	$97,200.00	
Actual profit earned during the three year period were	$21,411.50	
Total estimated loss due to restraint of Supply		$75,788.50

Exhibit 39 is a statement purporting to be a tabulation of estimated damages sustained by plaintiff Lysfjord, which is as follows:

Elmer Lysfjord—		
Recap of Loss Figures		
Commissions & Expected profits		
7 months @ $3,160.00 per month	$22,120.00	
San Bernardino Expense	$ 960.00	
Total	$23,080.00	
Less ½ of 1st year actual profits	$ 1,215.00	
Net total loss	$21,865.00	
Actual cost of tile purchased	$87,808.97	
Estimated cost from distributor based upon 17% overpayment for tile	$66,503.40	($75,050.40)
Total overpayment due to restrain [*sic*] of adequate supply	$21,305.57	($12,758.57)
Share of above chargeable to Elmer Lysfjord	$10,652.78	($ 6,379.28)

Average Earnings—R. W. Downer Co.	$ 1,580.00 per month	
Approximate profit based upon a 30% mark-up divided 10% for overhead; 10% salesman commission; 10 [*sic*] profit for company.		
Approximate profit for Elmer Lysfjord as an owner in business for himself would be:		
$1,580.00 as salesman's profit $1,580.00 as owner's profit	$ 3,160.00 per month	
Income for first seven months equals 7 x $3,160.00 or		$22,120.00

San Bernardino Expense:		
Rent @ $60.00 per month for 1 year	$ 720.00	
Promotional Expense and advertising	$ 500.00	
Utilities & Trucking Expense	$ 700.00	
Total	$ 1,920.00	
Share of exepense [*sic*] by Elmer Lysfjord		$ 960.00
Total loss by Elmer Lysfjord		$23,080.00

Approximate cost of 1 carload of tile is $6,000.00; average sales price of 1 carload of tile is $18,000.00; approximately 30% of $18,000.00 is gross profit. Thus, the approximate gross profit on 1 carload of tile is $5,400.00.

During the first year of business an average of one carload of tile per month would result in a gross profit of $64,800.00. This gross profit would be divided up as follows:

Overhead: ⅓ of $64,800 —$21,600.00
Profit—Walter Waldron —$21,600.00
Profit—Elmer Lysfjord —$21,600.00

Based upon 1 carload per month during 1952 Elmer Lysfjord would have a profit of	$21,600.00	
Based upon 1½ carloads per month during the second year the profit to Elmer Lysfjord would be	$32,400.00	
During the third year the profit to Elmer Lysfjord, based upon 2 carloads of tile per month, would be	$43,200.00	
Total Estimated profits during the three year period would have been	$97,200.00	
Actual profit earned during the three year period were	$21,411.50	
Total estimated loss due to restraint of supply		$75,788.50

Exhibit 43 is a statement which is called "Damages Based Upon Past Earnings Only" which is as follows:

DAMAGES BASED UPON PAST EARNINGS ONLY (based upon earnings of both plaintiffs with Downer Company projected into a 36-month period—January 1, 1952 to January 1, 1955.)	
$1,250.00 per month per each plaintiff, or $ 2,500.00 per month for both plaintiffs during period equals:	$90,000.00
Actual profits from aabeta company during said period (January 1, 1952 to Jan. 1, 1955) for both plaintiffs:	$42,823.00
Net loss based upon past earnings only:	$47,177.00
Plus estimated profit as owners on same amount of sales made for Downer Company; i.e., 10% constituting the $90,000.00, equals:	$90,000.00
Total loss of salary only:	$47,177.00
Total loss of normal profits as owners:	90,000.00
Total loss for same three-year period:	$137,177.00

In connection with the second tabulation on Exhibits 38 and 39, plaintiffs' accountant on cross-examination admitted that he had made an error in his calculation (R. 576), and the second, third and fourth figures in the tabulation were changed as follows (R. 622, 684): the figure $66,503.40 was changed to read $75,050.40; the figure $21,305.57 was changed to read $12,758.58; and the final figure was changed from $10,652.78 to read $6,379.28. We have inserted the amended figures in parentheses opposite the figures appearing on the original exhibits.

The plaintiffs' oral testimony with respect to alleged damages consisted almost entirely of an explanation of the figures appearing on these exhibits and would be unintelligible without reference to the exhibits. Therefore

no attempt will be made to quote or paraphrase the oral testimony as such. The general effect of it will be sufficiently brought out by the following brief statement of the figures appearing on Exhibits 38 and 39.

The first table on Exhibit 38 is based on the assumption that plaintiff Waldron earned on the average, while he was employed by the R. W. Downer Company, $1250.00 per month. It is further assumed that this figure is equivalent to 10% of the gross profit on jobs performed. The witness then assumes that in his own business he would perform as much work for himself as was done as a salesman for Downer, that as owner he would receive an additional 10% of the gross profit, and that he would therefore earn $2500.00 per month. From this he estimates the profits he should have made in operating his own business for a seven-months' period as $17,500.00. He then adds one-half of certain expenses incurred at San Bernardino, or $960.00, and arrives at a total of $18,460.00. From this he deducts one-half of the actual profits realized by the aabeta company for 1952, or $1215.00, and claims a net loss for the seven-month period of $17,245.00. A similar calculation is made on Exhibit 39 for plaintiff Lysfjord, but this is based on alleged average earnings with Downer of $1580.00 per month, and results in an alleged net loss for a seven-month period of $21,865.00.

The last tabulation on Exhibits 38 and 39 is based on the assumption that plaintiffs would sell a carload of tile per month for the first year of their business, a carload

and a half per month during the second year, and two carloads per month during the third year. They further assume that the gross profit on each carload of tile is $5,400.00, and that each plaintiff would realize one-third of this sum as his own profit. This calculation results in a total estimated profit for each of the plaintiffs for a three-year period in the amount of $97,200.00. From this, one-half of the actual profit earned by the plaintiffs during that period, or $21,411.50, is then deducted, resulting in a figure for each of the plaintiffs in the amount of $75,788.50.

Exhibit 43 is based on the assumptions that each plaintiff earned $1,250.00 per month with the Downer Company, or a total for the two plaintiffs of $2,500.00 per month, and that in their own business, if they had been able to purchase tile from Flintkote, they would have earned twice what they earned while with Downer, or, in a three-year period, $180,000.00. From this figure they subtracted their actual profits for the period of $42,823.00 and claimed a total loss of profits in the amount of $137,-177.00. The record with respect to the offer of these Exhibits, the objections thereto, and the court's ruling is as follows:

> "Mr. Ackerson: Your Honor please, I will offer Exhibits 38, 39—I will take them separately.
>
> I will offer Exhibit 38 in evidence as a tabulation of this witness' estimate of his damages.
>
> Mr. Black: To which we object, the court please, on the ground that no foundation whatever has been laid for the figures showing in this document.

It has been proved demonstrably erroneous. It is based on the sheer speculation of these witnesses on completely gratuitous assumptions, events that have no basis in the evidence as possibly foreseeable.

And for the further reason it extends, obviously, the damages beyond the recoverable period in this action, namely, the date of filing of suit.

For all of these reasons and the further grounds that it is incompetent, irrelevant and immaterial, we object.

The Court: What is the foundation for it, Mr. Ackerson? State it fully for the record.

Mr. Ackerson: The foundation, your Honor, has been the manner in which the documents have been prepared, the basis of them and the purpose of the introduction is limited to a physical exhibit of the opinion evidence of this witness.

The Court: Objection overruled. Document admitted.

(The document heretofore marked Plaintiffs' Exhibit 38 was received in evidence.)

Mr. Ackerson: I will offer for the same limited purpose Exhibit 39.

Mr. Black: We interpose the same objection to this document, if the court please.

The Court: Same ruling.

(The document heretofore marked Plaintiffs' Exhibit 39 was received in evidence.)

Mr. Ackerson: And I will offer for the same purpose, same limited purpose, Exhibit 43 for identification.

Mr. Black: To which we make the same objection, and the further objection to this document is that this builds speculation upon speculation.

This last document is predicated on the assumption that these people, establishing their own new business, would start out making precisely the same volume that they did with another company, financed by a company that was adequately financed. And gratuitously assuming that they are going to have the benefits of an owner immediately.

They start in business as of the first of the year when, on their own testimony, they didn't even start operations in the way of making any money after they got their business organized for several months.

It just is demonstrably inaccurate in every possible view. On those reasons and for the others we object to this.

The Court: The further reason goes to the weight of the evidence, what weight will a jury give it. They may accept it in whole or they might accept it in part or they may reject it.

It might be subject, as an estimate, to considerable modification before it is accepted, if it is ever accepted at all, as an appropriate measure of damages, if any are awarded.

The objection is overruled. The document is admitted." (R. 692-694.)

The foregoing summarizes the objections and motions to strike that were made during the course of the testimony explaining these Exhibits. Such objections appear at pages 602, 603, 628, 629 and 630. These objections were largely based on the ground that the figures appearing in the Exhibits were unsupported by anything in the record and consisted of mere speculation by the plaintiffs. The further objection was made that plaintiffs could not

recover as a matter of law for any damage arising out of their inability to purchase tile from Flintkote subsequent to the commencement of the suit. Extended argument on this point appears at pages 603 through 621 of the transcript.

14. The court erred in fixing the fee of plaintiffs' attorney at $25,000, which sum is clearly unreasonable.

15. The court erred in determining that the $20,000 paid to plaintiffs by former defendants in this action in consideration of the dismissal of the action against them and a covenant not to sue should be credited against the judgment for treble the damages found by the jury, when such $20,000 should have been credited against the damages found by the jury before the same were trebled. The Court's "Memorandum of Decision" (R. 116-24) clearly indicates that the question was properly before the court and that the court was fully aware of defendant's position in the matter.

ARGUMENT.

Summary of Argument.

The judgment below should be reversed and this court should enter judgment for defendant. Defendant's motion to set aside the verdict should have been granted. Viewing all the evidence in the light most favorable to the plaintiffs, the direct testimony that defendant had no knowledge of, and did not participate in any conspiracy has not been impugned.

Even if this court does not order judgment for defendant, a new trial should be granted because of numerous prejudicial errors committed by the trial court.

Two major errors were made in the admission of evidence: (1) Evidence tending to show that the acoustical contractors had an arrangement to fix prices and allocate bids was received over Flintkote's objection despite the fact that no connection between Flintkote and such conspiracy was proved. This was highly prejudicial, as the jury might well have reached the conclusion that the mere presentation of this testimony was some evidence of Flintkote's participation. (2) The court permitted the plaintiffs to testify regarding certain hearsay declarations of a purely historical nature allegedly made by Robert Ragland, a subordinate employee of Flintkote, although there was no showing of Ragland's authority to make such declarations or that he was at the time engaged in any transaction on behalf of his principal. The testimony was not admissible under any rule of evidence.

There were many errors in the court's charge to the jury. These were five in number:

1. Confusing and misleading instructions were given concerning recovery against "any defendant" participat-

ng in a conspiracy (although Flintkote was the only de-endant) without making it clear that Flintkote's par-icipation in such conspiracy would be a prerequisite to a verdict for plaintiffs.

2. The "rule of reason" was not properly explained.

3. The necessity of public injury was not clearly rought out in several "formula instructions."

4. The court failed to give proper instructions re-uested by defendant showing the specific application of efendant's theory of the case.

5. The court failed to give adequate instructions on he burden of proof.

The court abused its discretion by refusing to grant lefendant's motion for a new trial on the ground that he verdict was against the weight of the evidence.

The damages allowed were grossly excessive and nu-nerous errors were committed in connection therewith:

1. The court improperly admitted evidence and gave nstructions based on a misconception of the damage eriod. Damages should have been limited to those re-ulting from plaintiffs' inability to purchase tile from Flintkote on a direct basis up to the time the suit was iled (July 21, 1952). The court permitted the damages o be based on such inability to purchase tile up to the ime of the trial in May, 1955, although there was no vidence of any conspiracy after the summer of 1952.

2. The court received evidence of damage based on ure guess work and speculation.

3. The court abused its discretion by failing to grant new trial on the ground that the damages were exces-ive. The amount of the verdict was far in excess of any ctual damages proved.

The court allowed an excessive attorney's fee.

The court erred in its disposition of the $20,000 paid by former defendants in this case in exchange for a covenant not to sue and a dismissal filed before this action commenced. This sum should have been deducted from the damages fixed by the jury; instead of that, the court deducted it from the judgment after trebling the jury's verdict.

I.

There Was No Credible Evidence That Flintkote Knowingly Participated in an Unlawful Conspiracy. The Trial Court Erred in Denying Defendant's Motion to Set Aside the Verdict, and This Court Should Order Judgment Entered for Defendant.

(Specification of Error No. 1, p. 11.)

In this first section of the brief we shall state our reasons for our contention that this case should not have been allowed to go to the jury; that Flintkote's motions for directed verdict at the close of plaintiff's case and at the close of all of the evidence should have been granted; and that the trial court also erred in denying defendant's motion to set aside the verdict and enter judgment for defendant. If this Court agrees with us, it follows that the judgment appealed from must be reversed, and judgment should be ordered for defendant.

The question raised by Flintkote's motion to set aside the verdict and enter judgment for defendant was whether

bstantial evidence had been presented which, if believed
the jury, would authorize a verdict against Flintkote.

Sivert v. Pennsylvania R. Co., 197 F. 2d 371 (7th Cir., 1952);

Audirsch v. Texas & Pacific Ry. Co., 195 F. 2d 629 (5th Cir., 1952);

MacKay v. Costigan, 179 F. 2d 125 (7th Cir., 1950).

The theory on which the case was tried was that Flint-te was a knowing participant in a conspiracy among the oustical contractors in the Los Angeles area (R. 168). vidence was received which tends to show (1) a con-iracy existed among the acoustical contractors to fix ices and allocate jobs (*e.g.,* R. 491-503, 504-36); (2) rtain Flintkote contractors (we use the term "Flintkote ntractors" to mean the acoustical contractors to whom intkote sold tile in the Los Angeles area) objected to intkote about plaintiffs doing business in Los Angeles .g., R. 949-52, 1046-48, 1124-29, 1151-52); (3) one the Flintkote contractors allegedly threatened to boy-tt Flintkote if it did not cut plaintiffs off (R. 475) his evidence was admitted, over objection, and as will pointed out, *infra,* prejudicial error was thereby com-itted); (4) Flintkote cut plaintiffs off (*e.g.,* R. 239-41). Vith minor elaborations, that is the state of the evidence the light most favorable to plaintiffs and resolving ery conflict in their favor. The jury apparently con-uded that Flintkote joined in the contractors' conspiracy hen it cut plaintiffs off. The question now before this ourt is whether the jury could reasonably so conclude om the evidence, or, stated otherwise, whether there is ny evidence in the record supporting the jury's conclu-on.

Without considering the weight of the evidence, there is probably enough testimony in the record to support a conclusion that Flintkote cut off the plaintiffs as a result of the activities of the Flintkote contractors in complaining to Flintkote. If the evidence as to threats were properly admissible, one might perhaps conclude that Flintkote cut off plaintiffs because of those threats. However, neither of those conclusions, without more, will support a verdict that Flintkote violated the antitrust laws by cutting off plaintiffs.

The general rule is that The Flintkote Company, or anyone else engaged in private enterprise, may select its own customers and may sell or refuse to sell to any person, including these plaintiffs, for any cause or for no cause whatever.

United States v. Colgate & Co., 250 U. S. 300, 39 S. Ct. 465 (1919);

Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 73 S. Ct. 872, 889 (1953);

Johnson v. J. H. Yost Lumber Co., 117 F. 2d 53, 61-62 (8th Cir., 1941);

Chicago Seating Co. v. S. Karpen & Bros., 177 F. 2d 863 (7th Cir., 1949);

Nelson Radio & Supply Co. v. Motorola, 200 F. 2d 911 (5th Cir., 1952), *cert. denied,* 345 U. S. 925, 73 S. Ct. 783 (1953);

Blue Bell Co. v. Frontier Refining Co., 213 F. 2d 354 (10th Cir., 1954).

The seller's freedom of selection is abridged only when the refusal to sell is the result of a knowing participation in a conspiracy violative of the antitrust laws.

Johnson v. J. H. Yost Lumber Co., supra, 62;

Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286, 301 (S. D. N. Y., 1954).

The issue, then, is whether the evidence will support a nding of "knowing participation" in an unlawful con- piracy. The requirement is dual: it requires *both* knowl- dge *and* participation, and neither is sufficient without ie other. See, *e.g.,*

United States v. Falcone, 311 U. S. 205, 61 S. Ct. 204 (1940),

where the court said, beginning at page 206 of 61 S. Ct.,

"Respondents . . . cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy.

"The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. [citing cases] Those having no knowledge of the conspiracy are not conspirators, [citing cases]; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge."

Weniger v. United States, 47 F. 2d 692 (9th Cir., 1931),

where the court said, at page 693:

"The failure of a person to prevent the carrying out of a conspiracy, even though he has the power so to do, will not make him guilty of the offense without further proof that he has in some affirmative way consented to be a party thereto. Neither will the commission of an overt act, though unlawful in itself, be enough to show that the actor was a party to the conspiracy. The law requires proof of the

> common and unlawful design and the knowing participation therein of the persons charged as conspirators before a conviction is justified."

and,

> *United States v. Dried Fruit Ass'n of California,* 4 F. R. D. 1 (N. D. Cal., 1944),

where the court instructed the jury, at page 7, that

> "Each party must be actuated by an intent to promote the common design. . . . Co-operation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design."

Let us consider first whether there was evidence to support a finding that Flintkote *knew* of the conspiracy. There is no evidence that any Flintkote officer or employee actually knew of the conspiracy among the contractors. All of the direct evidence on that point is that they did *not* know. The only direct evidence of the state of Flintkote's knowledge respecting the existence of any conspiracy among the contractors is the testimony of Ragland (R. 815-16), Thompson (R. 1039), Lewis (R. 1049), Baymiller (R. 955-56), Heller (R. 1112-13) and Harkins (R. 1072), that each of them knew nothing about any conspiracy among the contractors. The fact that the *Flintkote* contractors individually approached Flintkote to complain about plaintiffs being in business will not support the conclusion that Flintkote knew the contractors were conspiring together to drive plaintiffs out of business.

Johnson v. J. H. Yost Lumber Co., supra.

Certain testimony of Lysfjord was admitted over objection respecting Ragland's alleged declarations concerning an alleged meeting among Flintkote and the Flintkote

ontractors at Flintkote's office (R. 474-76). We con-end that the testimony was improper and should be dis-egarded; and further, that there was no such meeting. But even if the testimony were admissible, it would not how any knowledge on Flintkote's part that a conspiracy xisted among the contractors. There is no indication f who called the supposed meeting or the purpose thereof. The only testimony about the meeting is that *one* of the ontractors allegedly present *individually* made an *indi-idual,* not a collective, threat against Flintkote. There s no evidence that any concerted action was taken by any wo or more persons at that meeting; there is nothing to how any agreement or concert of action among the per-ons present at the meeting. That testimony tends to how only two things: (1) that an individual threat was nade by one Flintkote contractor; and (2) that Flintkote net with two of its contractors and plaintiffs were men-ioned.

Clearly the fact of threats (assuming there were hreats) will not support an inference of knowledge of a onspiracy;

Johnson v. J. H. Yost Lumber Co., supra,

nd this should especially be so when all the evidence is hat there was but one threat of individual and not con-erted action.

Even assuming the alleged meeting took place, it should e equally apparent that the fact of a meeting among Flintkote and *its* contractors cannot support any infer-nce that Flintkote knew of a conspiracy among all the ontractors. If representatives of a non-Flintkote con-ractor had been present at the supposed meeting, an in-erence of notice to, or perhaps even knowledge by, Flint-

kote of a conspiracy might be permissible, but not otherwise. There are too many reasonable and lawful explanations for a meeting among Flintkote and its contractors to permit the inference of knowledge of conspiracy from the fact of meeting. (It is not disputed that the fact of the meeting, if it were the fact, is one circumstance which, in combination with others, might show that Flintkote joined a conspiracy or conspired with the contractors, if knowledge by Flintkote of the existence of the conspiracy were shown. However, the fact of the meeting is of no value in determining whether Flintkote *knew* of the conspiracy.)

The only evidence tending to show that Flintkote might have had even *reason to know* of the existence of the conspiracy is Waldron's testimony (R. 197) (only partially confirmed by Lysfjord at R. 449-50) that he told Thompson at the Manhattan Supper Club (3 months before the cut-off and before any arrangement had been made between Flintkote and plaintiffs) that if plaintiffs went into business in Los Angeles, it "would cause a lot of ill feelings among the general acoustical contractors in the city." "I told them [Flintkote] that they [acoustical contractors] were organized here and they didn't plan to have or would be very unhappy if they had a competing contractor in the field because they weren't competing with each other any more." "Mr. Thompson assured us that no amount of pressure would intimidate The Flintkote Company, that they were too big for that." Waldron's testimony indicated that the entire conversation on the point is substantially quoted above.

Waldron's remark to Thompson, assuming it was made, could not charge Flintkote with knowledge that there was a conspiracy in restraint of trade among the Los Angeles

coustical contractors. The discussion was short. It ould have been dismissed by Thompson as indicating that here was enough acoustical business to support all of the hen acoustical contractors without cut-throat price competition (and without combination) and that the contractors would be upset if someone new entered the field and pset that condition. It might well have been dismissed y Thompson as mere conjecture by Waldron reflecting is own fears at entering any competitive and established usiness and without foundation in fact. It certainly did ot prove the existence of a conspiracy, and, at most, it ndicated that Waldron thought there might be one. Thus, might have given Thompson some notice of the possiility that a conspiracy *might* exist. It did not have sufcient status to give Thompson reason to know of the xistence of the conspiracy.

Even if it were assumed that Waldron's statements ave Flintkote reason to know that a conspiracy might xist among the contractors, one should not be permitted o infer that Flintkote did in fact know thereof. *Knowng participation* in the conspiracy is prerequisite to liaility, not merely doing an act in fact in furtherance of he objects of a conspiracy with reason to know that a onspiracy might exist.

Johnson v. J. H. Yost Lumber Co., supra;

United States v. Falcone, supra;

Marino v. United States, 91 F. 2d 691, 694-96 (9th Cir., 1937), *cert. denied, sub nom.*

Gullo v. United States, 302 U. S. 764, 58 S. Ct. 410 (1938).

The test would appear to be *subjective, i.e.,* whether defendant actually knew, not *objective, i.e.,* whether defendant

had reason to know, or could have known, or even should have known.

It is apparent that no bit of testimony above discussed is by itself sufficient to support an inference that Flintkote knew about a conspiracy among the contractors. It should be equally apparent that, even in combination, all of the items of testimony will not support an inference that Flintkote *subjectively* and *actually knew* of the existence of a conspiracy. As noted above, there is absolutely no direct evidence of knowledge. All the direct evidence affirmatively shows lack of knowledge. True enough, circumstantial evidence *could* prove knowledge. But it is submitted that knowledge by Flintkote of the existence of a conspiracy among the contractors may not be inferred from the circumstances as to which there is testimony in this case.

All of the circumstances and evidence in this case are consistent with *lack* of knowledge by Flintkote of any conspiracy among the contractors. At most, the circumstances (other than the direct testimony of lack of knowledge) are equally consistent with knowledge and with lack of knowledge on Flintkote's part.

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, . . ."
>
> *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333, 339, 53 S. Ct. 391, 393 (1933).

"If the testimony leads as reasonably to one hypothesis as to another, it tends to establish neither."

Deadrich v. United States, 74 F. 2d 619, 622 (9th Cir., 1935);

United States v. Holland, 111 F. 2d 949, 953 (9th Cir., 1940);

Galloway v. United States, 130 F. 2d 467, 470 (9th Cir., 1942), *affirmed,* 319 U. S. 372, 63 S. Ct. 1077 (1943).

" 'When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' "

Pennsylvania R. Co. v. Chamberlain, supra, at 340 of 288 U. S. and 393-94 of 53 S. Ct., quoting from

Smith v. First National Bank in Westfield, 99 Mass. 605, 611-12.

It is thus apparent that, since lack of knowledge by Flintkote of any conspiracy is perfectly consistent with all of the circumstances of the case, those circumstances cannot form the basis of a finding that Flintkote had such knowledge.

"And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which

testimony it affirmatively appears that the fact sought to be inferred did not exist."

Pennsylvania R. Co. v. Chamberlain, supra, 288 U. S. at 340-41, 53 S. Ct. at 394.

The direct and positive testimony as to lack of knowledge must prevail over any contrary inference from circumstances equally consistent with the positive testimony.

In discussing proof of facts by circumstantial evidence, Wigmore, at

I Wigmore on Evidence, §41, p. 439 (3d ed., 1940),

quotes from *New York Life Ins. Co. v. McNeely,* 79 P. 2d 948 (Ariz., 1938), as stating the correct rule as follows:

". . . In criminal cases, they demand that when a conviction is to be based on a chain of inferences, each and every link in that chain must exclude every other reasonable hypothesis. In civil cases, involving only property rights, the rule is not so strict, and it is sufficient, if the ultimate fact is to be determined by an inference from facts which are established by direct evidence, that it be more probable than any other inference which could be drawn from the facts thus proven. But when an inference of the probability of the ultimate fact must be drawn from facts whose existence is itself based only on an inference or a chain of inferences, it will be found that the Courts have, with very few exceptions, held in substance, although usually not in terms, that all prior links in the chain of inferences must be shown with the same certainty as is required in criminal cases, in order to support a final inference of the probability of the ultimate fact in issue."

It has been held that doing an act which in fact furthers the objects of a conspiracy will not support a finding of knowledge of the conspiracy on the part of the actor. No inference may be drawn merely from the fact that plaintiffs were cut off.

United States v. Falcone, supra.

". . . the refusal of the supplier defendants to sell to the plaintiffs may have furthered the object of the conspiracy charged, but it did not prove that the suppliers knew of the conspiracy."

Johnson v. J. H. Yost Lumber Co., supra, 117 F. 2d at 62.

Further, there must be *substantial* evidence tending to show every material fact before the jury may be permitted to find for plaintiff; a mere scintilla of evidence is not enough.

Carew v. R. K. O. Radio Pictures, 43 F. Supp. 199, 200 (S. D., Cal. 1942);

De Zon v. American President Lines, 129 F. 2d 404, 407 (9th Cir., 1942), *affirmed,* 318 U. S. 660, 63 S. Ct. 814 (1943);

Galloway v. United States, supra (130 F. 2d);

United States v. Holland, supra.

". . . the essential requirement is that *mere speculation* be not allowed to do duty for probative facts, after making due allowance for all *reasonably* possible inferences favoring the party whose case is attacked." (Emphasis added.)

Galloway v. United States, 319 U. S. 372, 395, 63 S. Ct. 1077, 1089 (1943).

On the basis of the facts as to which there is testimony of any kind (even accepting all the testimony favorable to plaintiffs as true), it is no more probable that Flintkote knew of the existence of a conspiracy than that it did not, and, in fact, it would seem more probable that it did not. If the facts will not support an inference of knowledge of the conspiracy, it is impossible that they could support an inference of "knowing participation" in that conspiracy.

A mere showing of knowledge by Flintkote of the existence of a conspiracy among the contractors will not sustain plaintiffs' burden in this case. There must also be proof that Flintkote "knowingly participated" in the conspiracy, *i. e.,* that Flintkote was motivated by its knowledge of the conspiracy when it did the act which promoted the objects and purposes of the conspiracy.

> "We agree with defendants that the most important issue in this case was their motive in cancelling the Emich franchise. Certainly before plaintiffs could recover treble damages for the alleged wrongful cancellation they had to establish that such cancellation was pursuant to a conspiracy . . . And if defendants could show that they cancelled the dealerships for any other reason than Emich's failure or refusal to use GMAC, then the cancellations could not be said to be in furtherance of the illegal conspiracy."
>
> *Emich Motor Corp. v. General Motors Corp.,* 181 F. 2d 70, 78 (7th Cir., 1950), *reversed in part* on other grounds, 340 U. S. 558, 71 S. Ct. 408 (1951).

Obviously enough, if knowledge were *proved,* one could reasonably infer from the facts of knowledge of the conspiracy and the cut-off that Flintkote knowingly participated in the conspiracy when it cut off plaintiffs. How-

ever, that inference is not inescapable, and it is a further nference from the fact of knowledge. If knowledge can be found only at the end of a long and weak chain of nferences from the facts as to which there is testimony hen those facts will not support the further inference hat Flintkote was motivated by such knowledge when t cut off plaintiffs.

> "The crucial question is whether [Flintkote's] conduct toward [plaintiffs] stemmed from independent decision or from an agreement, tacit or express."
>
> *Theatre Enterprises v. Paramount Film D. Corp.*, 346 U. S. 537, 540, 74 S. Ct. 257, 259 (1954).

> "A conspiracy is 'a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, 'by criminal or unlawful means.' [citing cases.] It is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds."
>
> *Marino v. United States, supra,* 91 F. 2d at 693-94.

> ". . . an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement."
>
> *Id.* at 695.

The ultimate fact which is determinative of Flintkote's liability in this case is whether there was a "confederation of minds" among Flintkote and the contractors. The issue is the subjective intent of Flintkote (through its agents) in cutting off plaintiffs. Obviously, absent some kind of confession, Flintkote's intent would have to be proved, if at all, by inference from objective facts. In

this case, however, although all of the testimony (in the light most favorable to plaintiffs) is consistent with an intention on Flintkote's part to join the contractors' conspiracy, it is at least equally consistent with the inference that Flintkote had some other intention or motive in cutting off plaintiffs and did not intend to join any contractors' conspiracy; and all of the direct evidence is that Flintkote acted independently, pursuant to its own business judgment, and without participation in any conspiracy, combination or agreement.

It should be apparent, then, that there is no evidence in the record from which the jury could be permitted to find that Flintkote participated in any conspiracy or did any act in violation of the antitrust laws.

We make the foregoing contentions assuming that the testimony of Lysfjord and Waldron regarding certain alleged declarations by Ragland remains in the record. That testimony is discussed and the reasons for its inadmissibility are set forth at length in a later section of this brief, and reference is respectfully made thereto in this connection. If that testimony is excluded, as it should be, it is even more apparent that there is nothing in the evidence which will justify the jury's verdict against Flintkote.

It follows, then, that the court erred in denying Flintkote's motions for directed verdict at the close of plaintiffs' case and at the close of all the evidence and in denying Flintkote's motion to set aside the verdict and enter judgment for defendant. This Court should reverse the judgment and issue its mandate to the trial court to set aside the verdict and enter judgment for defendant Flintkote.

II.

n Any Event, the Judgment Should Be Reversed and a New Trial Ordered.

Even if this Court does not agree with us that judgıent should be entered for defendant, we believe it can e shown that substantial and prejudicial errors were ommitted by the trial court which call for a reversal and new trial.

We shall first discuss two major errors in connection vith the admission of evidence.

A. Prejudicial Error Was Committed in Admitting Evidence.

1. The Court Admitted Evidence Tending to Prove a Conspiracy Between Certain Contractors Without Showing Flintkote's Connection With the Alleged Conspiracy.

(Specification of Error No. 2, p. 11.)

Over defendant's objection the Court admitted evidence oncerning the activities of some of the acoustical tile ontractors, former defendants in the case, particularly he R. W. Downer Company, by whom plaintiffs were emloyed before they started their own business. This testiıony had to do with the following matters, among others: ertain meetings of some of the contractors, at which t is not even suggested that any Flintkote representative vas present (*e.g.*, R. 302 ff.); a long series of docuıents consisting of so-called "take off sheets" (Exs. 18 hrough 37), with which Flintkote had no connection vhatever; and discussions of business practices of certain mployees and officials in the Downer company (*e. g.*, R. 314-315) of which Flintkote was not shown to have iad any knowledge. This testimony indicated that the

Downer company often learned in some manner what the low bid was going to be on a public job and purposely put in a higher bid (*e. g.,* R. 317), presumably subject to some arrangement for allocating those public jobs among the various contractors.

Flintkote is, of course, a manufacturer of tile. It does not do any installation work and would not in any way be presumptively charged with knowledge of the practices and business methods of contractors.

The general effect of this testimony was such that one might infer from it that at least some of the contractors had evolved a plan for refraining from competitive bidding and for rotating jobs in certain public projects in the Los Angeles area among themselves.

To this testimony defendant objected and argued at length that it was all hearsay as to Flintkote and that before evidence of the acts and declarations of alleged co-conspirators could be received, the connection of the defendant with the conspiracy must first be established. (R. 278-94.)

This is, of course, the elementary and well-settled rule on which point no useful purpose would be served by elaborate discussion. The rule is succinctly stated in *Thomas v. United States,* 57 F. 2d 1039, 1041 (10th Cir., 1932):

> "To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established. [citing cases.]
>
> "Declarations made by one conspirator to another are not competent evidence to establish the connection of a third person with the conspiracy. [citing cases.]

"The existence of the conspiracy charged cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirator done or made in his abesnce. [citing cases.]"

In some instances where there are a great many defendants and a large number of alleged conspiratorial acts, particularly if the case is before the court rather than a jury, as a matter of practical expedience, evidence of this sort involving one or more of the defendants is sometimes admitted, subject to motion to strike, before a connection is shown with other defendants, but in so doing the courts recognize that this is a departure from the normal order of proof. See, *e. g.,*

United States v. Morgan, 11 F. R. D. 445, 454 (S. D. N. Y., 1951).

But at this trial defendant pointed out that this was a jury case; that there was but one defendant; that there was no reason to depart from the normal order of proof; and that by so doing, serious prejudice might be done to Flintkote if the necessary connection were not proved (*e. g.,* R. 285-86).

The court nevertheless proceeded to admit the evidence, subject to motion to strike.

Several court days were taken up with this testimony, and when the motion to strike was made, the court denied it.

The trial court should have sustained defendant's objection and should have required plaintiffs to prove the connection, if any, with Flintkote before admitting evidence of the acts and declarations of the contractors and

their employees. We think it clear that no connection between the contractors and defendant *was* proved, and that defendant's motion to strike should have been granted. As we have argued above, the motion for directed verdict was also improperly denied.

But even if there were some tenuous conflicting evidence of a connection between the contractors' practices and Flintkote, which we deny, the court should have required the presentation of that evidence first, so that the matter could be viewed in its proper perspective. Allowing this evidence of the activities of the contractors to be presented over repeated objections, might well have caused the jury to conclude that its mere presentation was some evidence of Flintkote's participation in a conspiracy.

It is idle to suggest that this highly inflammatory testimony did no damage to Flintkote because it was admitted only subject to motion to strike. In the case of *Krulewitch v. United States,* 336 U. S. 440, 453, 69 S. Ct. 716, 723 (1949), Mr. Justice Jackson stated, in his concurring opinion:

> "Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. *In other words, a conspiracy often is proved by evidence that is ad-*

missible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, Cf. Blumenthal v. United States, 332 U. S. 535, 559, 68 S. Ct. 248, 257, *all practicing lawyers know to be unmitigated fiction.* See Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F. 2d 54." (Emphasis ours.)

The admission of this evidence was highly prejudicial and prevented a fair trial of the issues. Despite the fact that the contractors were no longer in the case, by adopting this procedure the court in effect treated Flintkote as a co-defendant with the contractors. Again quoting Mr. Justice Jackson in the opinion referred to above:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." (336 U. S. at 454, 69 S. Ct. at 723.)

This case in effect was tried against Downer and some of the other contractors. These were the people who had already paid plaintiffs $20,000.00 in exchange for a dismissal. (Evidence of that fact, however, was withdrawn from the jury by stipulation.) The jury's indignation against the contractors was apparently aroused and the jury proceeded to punish Flintkote for *their* conduct.

2. The Court Improperly Admitted Hearsay Testimony of Alleged Declarations of a Subordinate Employee of Defendant.

(Specifications of Error Nos. 3 and 4, pp. 11-13 and 13-20.)

In this section, we shall discuss the trial court's plain error in admitting the testimony of the plaintiffs Waldron and Lysfjord respecting certain alleged declarations by Robert Ragland and in failing to strike that testimony from the record. The testimony and the objections urged at the trial are set out in full in the specifications of errors referred to above and need not be repeated here.

In order to set these matters in their proper perspective, it should be noted that neither Lysfjord's nor Waldron's testimony about Ragland's alleged declarations was supported by any foundation respecting (1) the purpose of Ragland's alleged visit to plaintiffs' place of business when the declarations were made, (2) any other matters which may have been discussed or handled at the meetings when the declarations were made (or meeting, as the case may be), (3) the scope of Ragland's authority (either actual or ostensible) with respect to (1) and (2) or the declarations. It is defendant's contention that, on the foundation laid (even considering all other evidence in the case, without regard to time of introduction), the testimony of plaintiffs respecting the alleged declarations of Ragland was hearsay; did not relate to a party's admission; was not regarding a declaration of a co-conspirator in furtherance of the conspiracy; was not regarding an overt act in furtherance of the conspiracy; was not regarding an act within any concept of *"res gestae";* was not within any exception to the hearsay rule; and was therefore inadmissible. We shall discuss these contentions in order:

(a) *The Testimony Was Hearsay.*

On its face the testimony objected to comes within the classical definition of hearsay. It is a recital by a witness of an out-of-court declaration of a third party used to establish the truth of the matter asserted in the declaration.

> "The Hearsay rule points out that B's [Ragland's] assertion, offered testimonially, is not made on the stand and presently, but out of court anteriorly, and challenges it upon that ground. The Hearsay rule tells us that B's assertion (even assuming B to have been qualified, by knowledge and otherwise, as witness) cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error. The Hearsay rule predicates a contrast between assertions untested and assertions tested; it insists upon having the latter." (V Wigmore, *op. cit. supra,* §1361, p. 3.)

In other words:

> "What we are here concerned with is . . . [the] notion . . . that *when a specific person, not as yet in court, is reported to have made assertions about a fact, that person must be called to the stand* [to testify to the fact sought to be proved], or his assertion will not be taken as evidence." (*Id.* at §1364, p. 10) (emphasis is Wigmore's.)

(b) *The Testimony Did Not Relate to a Party's Admission.*

Ragland's alleged declarations are not removed from the operation of the hearsay rule on any theory that they were admissions of a party, because those alleged declarations of Ragland did not constitute admissions of defendant Flintkote.

For the out-of-court declarations of an agent to be admissible against his principal, the declarations must be within the scope of the authority conferred upon that agent and made while in the exercise of his authority.

IV Wigmore, *op. cit., supra,* §1078, pp. 119-120;

2 Fletcher, *Cyclopedia Corporations,* §733, p. 999 (Perm. ed. 1954).

And before it can be said that such statements are made "while in the exercise of his authority," it must appear that they were made in the course of a transaction then being executed for the principal.

IV Wigmore, *op. cit., supra,* §1078, pp. 119-120;

2 Fletcher, *op. cit., supra,* §733, p. 999;

See, Paramount Productions v. Smith, 91 F. 2d 863, 865-866 (9th Cir.), *cert. denied,* 302 U. S. 749, 58 S. Ct. 266 (1937).

We are dealing here with the claimed admissions of a subordinate employee of a corporation. Fletcher, quoting with approval from the language of two Michigan cases, has this to say about the declarations of such agents:

> " 'The declarations and admissions of subordinate corporate agents are binding upon a corporation only when made in connection with the particular business intrusted to them and such declarations must be incidental to the duties which they are intrusted to perform.' 'Were the rule otherwise, the fortune of every man would rest on the veracity of his errand boy.' " (2 Fletcher, *op. cit., supra,* §747, pp. 1049-1050.)

There is no evidence that Mr. Ragland was a general representative of defendant. Indeed, the record affirmatively discloses the contrary. Mr. Ragland was at most

a lower echelon salesman with no authority to determine whether or not to sell acoustical tile to plaintiffs on a direct basis or any basis, either at the outset or in connection with the cut-off. All of the testimony is to the effect that Mr. Ragland was a mere subordinate corporate agent of The Flintkote Company. There is absolutely nothing in the record to indicate that he had authority, express or implied, to make the declarations here involved.

There is not a shred of evidence that Mr. Ragland, at the time of the alleged declarations, was engaged in any transaction on behalf of defendant. Lysfjord testified only that "Mr. Ragland came into the office, met me at the office" (R. 474). Waldron testified only that "At our office. Mr. Ragland came in and was telling us about—" (R. 258) "He was telling us that Mr. Gus Crouse—" (R. 259). Neither Lysfjord nor Waldron related a single business transaction which occurred at those meetings (or at that meeting) with Mr. Ragland. It does not appear that Mr. Ragland had any mission at all to perform on behalf of his principal, The Flintkote Company, on either (or that) occasion. The record shows only that in each (or that) case Mr. Ragland appeared at the Bell office, made the alleged statements, and (presumably) left. Thus on plaintiffs' testimony, to hold that the alleged declarations of Ragland were admissions of Flintkote would be a striking case of resting the fortune of the principal, The Flintkote Company, on the veracity of its "errand boy."

Since there was no evidence either that Mr. Ragland had authority to make the declarations in question or that he was engaged in a transaction on behalf of defendant at the time they were made, the conclusion is

inescapable that plaintiffs wholly failed to lay an adequate foundation upon which to premise the admission of the challenged testimony as constituting admissions of Mr. Ragland's principal, The Flintkote Company.

Furthermore, the declarations, as related by plaintiffs, were pure narrative, entirely historical in character. It is beyond dispute that the declarations of an agent which are merely narrative of a past transaction, that is, historical in nature, and which have no connection with any transaction then being conducted by the agent with authority for his principal, are not considered as being made in the course of such a transaction, and therefore, do not constitute admissions properly chargeable to the principal.

2 Fletcher, *op. cit., supra,* §735, pp. 1015-16.

It is thus apparent that the declarations here under discussion were neither expressly authorized nor made in the course of and as a part of a transaction within the scope of Ragland's authority in which he was then engaged; and the declarations were all purely historical. They did not constitute admissions of Flintkote.[1]

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[1]In further support of this proposition, see:

Mutual Sav. Life Ins. Co. v. Hall, 49 So. 2d 298, 300 (Ala. 1950);

Decker v. Consolidated Feed, Coal & Lumber Co., 137 N. J. L. 154, 59 A. 2d 15, 16 (1948);

Hansen v. Eagle-Picher Lead Co., 8 N. J. 133, 84 A. 2d 281, 286-287 (1951);

Merchants' Nat. Bank of Gardner v. Clark, 139 N. Y. 314, 34 N. E. 910 (1893);

State Bank of Brocton v. Brocton Fruit Juice Co., 208 N. Y. 492, 102 N. E. 591, 592 (1913);

Shelton v. Wolf Cheese Co., 93 S. W. 2d 947, 952 (Mo. 1936);

Southern Surety Co. v. Nalle & Co., 242 S. W. 197 (Comm. of Appeal of Texas 1922).

(c) *The Testimony Was Not Admissible as Relating to Declarations of a Co-conspirator.*

The court apparently admitted the testimony of Waldron respecting the Ragland declarations appearing at pages 259, 261-63, 266 and 269-70 of the Record on the theory that Ragland was a co-conspirator with Flintkote and that his declarations in the course of and in furtherance of the conspiracy bound Flintkote. See the remarks of the court appearing at pages 259-60 of the Record. That theory cannot be applied to these alleged declarations.

It is well settled that a conspiracy cannot exist between a corporation and its employee or agent acting as such.

> *Nelson Radio & Supply Co. v. Motorola,* 200 F. 2d 911 (5th Cir. 1952), *cert. denied,* 345 U. S. 925, 73 S. Ct. 783 (1953).

There is no evidence in the record tending to indicate that Ragland's relationship to Flintkote was ever anything other than that of an employee.

There is no evidence that Mr. Ragland conspired with any of the acoustical contractors in his individual capacity. Obviously, then, his acts and declarations cannot be admitted as acts or declarations of a conspirator.

Even if on some unexplained theory Mr. Ragland could be considered as a co-conspirator with the contractors and Flintkote, his acts and declarations are not admissible to bind Flintkote until such time as Flintkote's participation is shown by independent acts or declarations, *i.e.,* other than the acts or declarations of co-conspirators.

> *United States v. Schneiderman,* 106 F. Supp. 892, 903 (S. D. Cal. 1952).

Even if these difficulties were surmounted, the testimony would still be inadmissible. The declarations, stand-

ing alone and not as a part of any transaction, there being no evidence connecting them with any transaction, in no way furthered the objects of the alleged conspiracy. Webster's New International Dictionary, Second Edition, defines "furtherance" as:

> "Act of furthering, or helping forward; promotion; advancement; progress." (p. 1022.)

Substantially the same meaning was given the phrase in

> *People v. Smith,* 151 Cal. 619, 626, 91 Pac. 511, 513 (1907),

a prosecution for murder, where the court defined it as follows:

> "A declaration, statement, or act of a conspirator, to be admissible as in 'furtherance' of the conspiracy, must, as the word 'furtherance,' *ex vi termini,* imports, be an act, statement, or declaration which in some measure, or to some extent, aids or assists towards the consummation of the object of the conspiracy."

Manifestly, as a matter of law it cannot reasonably be said that the statements themselves were in furtherance of the conspiracy. On the contrary it would seem that revealing the conspiracy to the intended victims would tend to frustrate its objective.

Moreover, it has frequently been said that mere narrative declarations by co-conspirators are not competent for the reason that they are not ordinarily in furtherance of a conspiracy.

> *Logan v. United States,* 144 U. S. 263, 12 S. Ct. 617, 632 (1892);
>
> *Mayola v. United States,* 71 F. 2d 65, 67 (9th Cir. 1934);
>
> *United States v. Food and Grocery Bureau of So. Cal.,* 43 F. Supp. 966, 970 (S. D. Cal., 1942).

As has already been pointed out, these declarations are pure narrative, entirely historical in character. Therefore, their utterance by Mr. Ragland could not in any sense have furthered the alleged conspiracy.

(d) *The Testimony Was Not Admissible as Describing Overt Acts in Furtherance of the Conspiracy.*

The court suggested at the time that Lysfjord's testimony was allowed in evidence that Ragland's declarations were an overt act in furtherance of the conspiracy (R. 471) (apparently, although not expressly, concluding that they were thus not hearsay or were within some exception to the hearsay rule). What has just been said with respect to the admission of Waldron's testimony on the theory that Ragland's declarations constituted admissions of a co-conspirator and were thus binding upon Flintkote is applicable here. Ragland was not a co-conspirator with Flintkote. Even if on some theory he had been a co-conspirator with the contractors, his alleged declarations could not be admitted against Flintkote because no participation by Flintkote in the contractors' conspiracy was independently proved. In any event, the act of reciting to the victims of a conspiracy an historical account of the activities of the alleged conspirators could hardly be characterized as an overt act in furtherance of the conspiracy.

(e) *The Testimony Is Not Admissible as Describing Part of the Res Gestae.*

The court also suggested at the time that Lysfjord's testimony was allowed in evidence that Ragland's alleged declarations were a part of the *res gestae* of the alleged conspiracy itself (R. 476) (again apparently concluding that the hearsay rule did not bar their admission). But that testimony was not admissible on any such theory.

Defendant has been unable to find any reference in either antitrust cases or general conspiracy cases where reliance was placed upon the proposition that a conspiracy viewed as a whole has a *res gestae*. The term *"res gestae"* is not so elastic. It is not a catch-all device to permit the reception of evidence otherwise clearly inadmissible. Black's Law Dictionary, Third Edition, defines the term as follows:

> "Things done; transactions; essential circumstances surrounding the subject. The circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." (p. 1539.)

In

> *St. Clair v. United States,* 154 U. S. 134, 14 S. Ct. 1002 (1894),

the court quoted with approval from Wharton on Evidence as follows:

> " 'The *"res gestae,"* ' Wharton said, 'may be, therefore, defined as those circumstances which are the undesigned incidents of a *particular* litigated *act,* and which are admissible when illustrative of such *act.*" (14 S. Ct. at 1008; emphasis added.)

The meaning of *"res gestae"* was fairly put by the court in

> *People v. Perkins,* 8 Cal. 2d 502, 66 P. 2d 631 (1937),

when it said:

> "[W]here it is the event speaking through the person and not the person telling about the event, . . . such declarations are part of the *res gestae* and admissible in evidence." (8 Cal. 2d at 514, 66 P. 2d at 636-37.)

It cannot be said that a conspiracy is an event or an act. Certain conduct, either acts or declarations, it is true, may be said to be in furtherance of a conspiracy, and declarations at the time of the acts may constitute a part of the *res gestae* of that particular act, but a narrative declaration as to past events, standing alone, illustrates nothing. There is no suggestion here that Ragland's alleged declarations were spontaneous exclamations contemporaneous with a conspiratorial act. It clearly is a case of a person telling about a past event, rather than an event speaking, in part, through a person's declarations. It follows that the declarations by Mr. Ragland may not find their way into evidence under the guise of the *"res gestae"* of conspiracy.

From all of this, we submit that the testimony was pure hearsay and clearly inadmissible.

(f) *The Erroneous Admission of This Testimony Was Highly Prejudicial.*

The testimony regarding the alleged Ragland declarations was prejudicial to Flintkote for all of the following reasons, among others: (1) It brought before the jury evidence of at least two contacts between Flintkote and the contractors which were not otherwise adverted to in the evidence, one of which was an alleged general meeting suggesting concerted action; (2) It being Flintkote's position that the declarations were not made, it was necessary that Ragland deny making the same, and this may have given them unwarranted importance in the jury's mind; (3) It being Flintkote's position that the events described in the alleged declarations did not occur, it was necessary that the occurrence of the supposed events be denied, and having each person who was supposed to

be involved in the events deny the same may have given the testimony unwarranted significance in the minds of the jurors; (4) The admission of these declarations, over repeated and extended objection, may well have given the declarations unusual probative value with the jury; (5) The admission of the declarations tended to obscure the issues in the case and might, if not properly analyzed, have led the jury astray in its reasoning; (6) The alleged actions of the contractors as related in the declarations would tend to inflame the jurors against the contractors, and cause the jury to sweep Flintkote along with the contractors.

Obviously, then, the admission into evidence of the aforesaid testimony was error, and that error was both substantial and prejudicial. The error was grave enough that it, standing alone, warrants a reversal of the judgment and a new trial in this action.

B. The Court Erred in Its Instructions to the Jury.

Defendant believes that the instructions given by the trial court were erroneous in at least five particulars. We shall discuss these contentions under separate headings.

1. The Court Failed Adequately to Instruct the Jury That Flintkote Was the Only Defendant and That Its Participation in an Unlawful Conspiracy Was a Prerequisite for a Verdict for Plaintiffs.

(Specification of Error No. 5, pp. 20-23.)

The court erred in failing adequately to instruct the jury that it could return a verdict for plaintiffs only if it found that defendant Flintkote was a party to an unlaw-

ful conspiracy in restraint of interstate commerce which injured plaintiffs and in failing adequately to instruct the jury that defendant Flintkote was the only defendant in the case.

On several occasions, the court in its instructions referred to "defendants." Such reference to "defendants" was wholly misleading, since there was but one defendant in the case: The Flintkote Company. The action, as has been shown, was originally brought against the acoustical tile contractors and various individual defendants as well as Flintkote (R. 3), but the contractors made a settlement with plaintiffs, and the action had been dismissed as against all defendants other than Flintkote before the trial commenced (R. 95-103, 113-14). Numerous references to "defendants" could have no effect other than to confuse the jury as to whom this action was really against, whose conduct was under investigation, whose conduct must supply the basis for the verdict, and who would have to pay any damages which the jury might assess. Admittedly, the court said at R. 1239, "but there is only one defendant here. . . . We are trying the case here today as to this one defendant." The court also correctly instructed the jury in the second complete paragraph of R. 1246, the first full paragraph of R. 1247, and the first full paragraph of R. 1252 that Flintkote's participation in an unlawful conspiracy was prerequisite to a verdict for plaintiffs. However, the repeated references to "defendants" inevitably created confusion; they may well have given the jury the impression that some defendants other than Flintkote were in some way still involved in the case and that a verdict for plaintiffs could be based on the activities of those "defendants" without Flintkote's participation therein.

Several of the instructions, however, require specific discussion of errors in this connection in addition to the references to "defendants" contained therein. At R. 1236, the court correctly stated the general rule that Flintkote could refuse to deal with plaintiffs for any cause or for no cause whatever, but the court went on to qualify that rule incorrectly by stating: "But under the antitrust laws it cannot do so if there has been a conspiracy." That qualification was erroneous for several reasons and resulted in the entire statement being erroneous. The charge indicated that Flintkote's refusal to deal with plaintiffs might be unlawful if there had ever been any conspiracy, without regard to the legality or subject matter thereof or Flintkote's participation therein. It ignored completely the element of Flintkote's motive in refusing to sell to plaintiffs. Flintkote can be liable for refusing to sell to plaintiffs only if that refusal was the result of *knowing participation* by Flintkote in an *unlawful conspiracy*. (See discussion and authorities cited at pp. 48-50, 53, 58-59, *supra*.) Any charge which would permit the jury to find liability of Flintkote on any lesser showing is necessarily erroneous and prejudicial.

At R. 1245, the court flatly stated that the jury may bring in a verdict against someone other than Flintkote, saying: "your verdict should be in favor of the plaintiffs as to each defendant whom you find to have knowingly participated therein." That statement was manifestly erroneous. Flintkote was the only party defendant, and any verdict for plaintiffs necessarily had to be against Flintkote and no one else. The instruction ignores the essential element of any verdict for plaintiffs: that the

jury find that Flintkote had participated in the unlawful conspiracy.

At R. 1250, the court again instructed the jury in substance that it could return a verdict for plaintiffs without finding that Flintkote participated in any unlawful conspiracy, saying: ". . . if you find that Mr. Ackerson was right in his arguments here, and the evidence does show that there was a conspiracy, . . . Your duty . . . will be to compensate the plaintiffs for the loss which they have sustained." That suggestion to the jury that it take the opportunity presented to it to compensate plaintiffs for any loss sustained by them without regard to any liability on Flintkote's part for the creation of the loss is plainly wrong.

The most flagrantly erroneous and prejudicial of the individual instructions of the court in this category is found at R. 1245: "If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs, . . ." That particular instruction is erroneous for several reasons and is discussed further, *infra.* It disregards the necessity of knowing participation by Flintkote in a combination or conspiracy as a prerequisite to a verdict for plaintiffs. On the contrary, the jury is permitted to return a verdict for plaintiffs (which must necessarily be against Flintkote) upon a showing that *any* two or more of the *"defendants"* (not necessarily Flintkote) acted together. This disregards the law and Flintkote's rights.

The error in the respects above noted is not cured by the fact that the court in another part of the charge gave correct instructions respecting the necessity for a finding of Flintkote's participation in a conspiracy as a prerequisite to a verdict for plaintiffs.

> "These instructions were conflicting and therefore erroneous."
>
> *Voss v. Becko,* 192 F. 2d 827, 830 (8th Cir. 1951).

In *Paramount Film Distributing Corp. v. Applebaum,* 217 F. 2d 101 (5th Cir. 1954), *cert. denied,* 349 U. S. 961, 75 S. Ct. 892 (1955), the court had before it three instructions which were incorrect in stating as a matter of law that a distributor of motion pictures must accept all equally suitable exhibitors as customers and must treat them all equally; the trial court had also given four correct instructions which repeatedly and correctly stated that no duty rested on the defendants to license plaintiffs if they acted independently and their refusal to license was not the result of an illegal conspiracy. In response to the contention that the correct instructions cured any error in the incorrect instructions, the court stated, at page 125 of 217 F. 2d:

> "[W]e cannot agree that their presentation made it clear that they superceded the three erroneous instructions previously given. The record reflects no reference, direct or otherwise, to the three erroneous instructions, anywhere in the entire charge. There is nothing from which the jurors would necessarily conclude that the judge was qualifying or otherwise correcting the misconception which obviously resulted from the previous erroneous instructions. The propositions presented are some forty pages apart in the printed record and are completely contradictory in

> substance. Rather than cure or clarify the error in the three previous instructions, the giving of the four instructions requested by appellants must have resulted in additional confusion in the minds of the jurors. *Certainly it cannot be said as a matter of law that the giving of later contradictory charges correctly stating the law necessarily cures previous erroneous instructions.* Where the error is so fundamental as that in the three instructions given upon appellees' request, *it must appear that later instructions or the charge as a whole so clearly obliterated the error as to render it reasonably certain that no prejudice resulted.* The four correct instructions given at appellants' request cannot be said to have had that effect." (Emphasis added.)

The court went on to state, at page 125 of 217 F. 2d:

> ". . . we reluctantly conclude that the charge as a whole was most confusing and did not clarify or remove the prejudicial effect of the erroneous instructions."

The remarks of Judge Dawkins quoted above are pertinent to the case at bar. Here there were seven instructions which were incorrect in the particulars here under discussion (four of them grossly and prejudicially incorrect) and four correct instructions. The record in this case "reflects no reference, direct or otherwise, to the . . . erroneous instructions, anywhere in the entire charge." The propositions are rather widely separated in the instructions (though not so widely as in the *Paramount* case) and are "completely contradictory in substance." It is submitted that the correct instructions "resulted in additional confusion in the minds of the jurors" rather than curing or clarifying the error in the erroneous instructions. In the *Paramount* case, the in-

structions complained of stated as a matter of law that certain conduct of the defendants was unlawful without any finding of unlawful conspiracy. In this case, the instructions complained of in this section stated that the jury could bring in a verdict for plaintiffs without any finding that *Flintkote* (as opposed to "defendants") knowingly participated in an unlawful conspiracy. The prejudicial effect of those erroneous instructions was in no way removed or diminished by the correct instructions.

2. The Court Failed to Give Proper Instructions Regarding Reasonability of Restraints of Trade.

(Specification of Error No. 6, pp. 23-27.)

The court erred in instructing the jury that the reasonability or unreasonability of any restraint of trade which the jury might find was unimportant and in failing to instruct the jury that only unreasonable restraints of trade are prohibited by the law and that the reasonability of any restraint found by the jury was a question for the jury to decide.

It is well established that merely because a contract, combination or concert results in a restraint of trade or commerce, it does not follow automatically that it is of an unlawful nature; only unreasonable restraints of trade or commerce are prohibited. That principle was first definitively announced by the Supreme Court in

Standard Oil Co. v. United States, 221 U. S. 1, 31 S. Ct. 502 (1911),

where the court said, at page 517 of 31 S. Ct.:

> "The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the

statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but, while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute."

The requirement that the restraint be unreasonable to be unlawful has been applied consistently in the later cases.

". . . the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. . . . the evidence admitted makes it clear that the rule

was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law."

Board of Trade of City of Chicago v. United States, 246 U. S. 231, 38 S. Ct. 242, 244 (1918).

See also:

United States v. Bausch & Lomb Optical Co., 321 U. S. 707, 64 S. Ct. 805, 816 (1944);

Sugar Institute v. United States, 297 U. S. 553, 597-600, 65 S. Ct. 629, 641-43 (1936);

Associated Press v. United States, 326 U. S. 1, 14-15, 65 S. Ct. 1416, 1422 (1945);

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721, 726 (10th Cir., 1955).

In none of the instructions of the court quoted in Specification No. 6, above, was the requirement that the restraint be unreasonably adverted to in any way. Flintkote does not contend that it would be improper for the court to instruct the jury that certain restraints of trade are illegal *per se,* and that if restraints of that category were found, the jury need not concern itself further with the matter of reasonability. Flintkote does contend, however, that the requirement of unreasonability of the restraint as a prerequisite to liability was not properly reflected in the charge of the court as given and that the Court's failure to submit an essential question of fact to the jury was error.

3. The Court Failed to Give Adequate Instructions as to the Necessity for Showing Public Injury.

(Specification of Error No. 7, pp. 27-28.)

The court erred in giving the jury conflicting instructions regarding the necessity of a finding of injury to the

public as a prerequisite to a verdict for plaintiffs. That such a finding is prerequisite to a verdict for plaintiffs and that the law was correctly stated in Flintkote's proposed instructions numbers 30-32 (reproducted at pages 27 to 28, *supra*) is established by the following cases:

Shotkin v. General Electric Co., 171 F. 2d 236 (10th Cir., 1948);

Feddersen Motors v. Ward, 180 F. 2d 519 (10th Cir., 1950);

Interborough News Co. v. Curtis Publishing Co., 127 F. Supp. 286, 301 (S. D., N. Y., 1954), *affirmed,* 225 F. 2d 289 (1955).

The trial court recognized the necessity for instructions of this character and in fact gave defendant's proposed instructions numbers 30 and 32 (R. 1249).

The court's error was in giving other conflicting instructions which would allow the jury to find for plaintiffs without first finding that the public had been injured. Those instructions are set forth at length in Specification of Error No. 6, *supra.*

> "Certainly it cannot be said as a matter of law that the giving of later contradictory charges correctly stating the law necessarily cures previous erroneous instructions. Where the error is so fundamental . . . it must appear that later instructions or the charge as a whole so clearly obliterated the error as to render it reasonably certain that no prejudice resulted."
>
> *Paramount Film Distributing Corp. v. Applebaum, supra,* 217 F. 2d at 125 (5th Cir., 1954).

In this case the court's correct instructions did not refer in any way to the prior erroneous instructions. There was no indication that the later instructions super-

seded or were intended to correct the prior instructions. It follows that the later instructions did not cure the prior erroneous instructions.

Flintkote was clearly prejudiced by the erroneous instructions since they advised the jury that it could bring in a verdict for plaintiffs without first finding that a fact indispensable to such a verdict existed.

4. The Court Failed to Give Instructions Requested by Defendant Showing Specific Application of Defendant's Theory of the Case.

(Specification of Error No. 8, pp. 28-29.)

The court erred in failing to present to the jury in its instructions any specific application of the law to defendant's theory of the facts either by way of giving the substance of defendant's requested instructions numbers 24, 25 and 33, or otherwise. Flintkote's defense of the action consisted principally of generally denying knowledge of or participation in any conspiracy in restraint of trade and offering the explanation of its conduct in refusing to deal with plaintiffs that plaintiffs had violated an express understanding that they would not do business in the Los Angeles area. Flintkote's entire defense by way of explanation of its conduct was embodied in instructions numbered 24 and 33. Defendant's requested instruction number 33 correctly stated that Flintkote's restricting the number of Flintkote acoustical tile contractors in the Los Angeles area was not inherently unlawful and would not be wrongful unless done for an unlawful purpose.

Bascom Launder Corp. v. Telecoin Corp., 204 F. 2d 331, 335 (2d Cir.), *cert. denied*, 345 U. S. 994, 73 S. Ct. 1133 (1953);

Brosious v. Pepsi-Cola Co., 155 F. 2d 99 (3d Cir., 1946);

Boro Hall Corporation v. General Motors Corporation, 124 F. 2d 822, 823 (2d. Cir.), and see opinion on denial of rehearing, 130 F. 2d 196, 197 (2d Cir., 1942), *cert. denied,* 317 U. S. 695, 63 S. Ct. 436 (1943);

United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387, 398-399 (S. D. N. Y., 1942), *modified in non-pertinent respects, and, as modified, affirmed,* 321 U. S. 707, 64 S. Ct. 805 (1944);

United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 287 (6th Cir., 1898), *modified* and *affirmed,* 175 U. S. 211, 20 S. Ct. 96 (1899).

Defendant's requested instruction number 24 stated that Flintkote could not be liable to plaintiffs if it refused to deal with them because they had invaded the trade territories of established Flintkote dealers contrary to a condition imposed by Flintkote and not because of an unlawful conspiracy. That instruction also constituted a correct statement of the law applicable to this case,

Johnson v. J. H. Yost Lumber Co., supra;

Interborough News Co. v. Curtis Publishing Co., supra,

and the testimony elicited in the course of the trial amply justified submitting an instruction based on a finding of the facts contained therein to the jury (see, *e.g.,* R. 1064-72).

Defendant's requested instruction number 25 stated the law correctly to the effect that refusing to deal with plaintiffs as the result of pressure by other persons would not constitute participation in an unlawful conspiracy and that knowledge of an unlawful conspiracy could not be

inferred solely from the fact that Flintkote succumbed to such pressure.

Johnson v. J. H. Yost Lumber Co., supra;

Interborough News Co. v. Curtis Publishing Co., supra.

The evidence amply warranted the giving of that intsruction, for although Flintkote did not claim that its refusal was the result of pressure by the contractors, plaintiffs had averted to pressure from the contractors as the reason for Flintkote's action on several occasions (see, *e.g.,* R. 197, 257, 449, 488, 262-63, 270, 475, 476).

Flintkote was entitled to have the aforesaid three instructions (or their substantial equivalent) given to the jury, and the court's failure to do so constituted prejudicial error.

> "It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made."
>
> *Chicago & N. W. Ry. Co. v. Green,* 164 F. 2d 55, 61 (8th Cir., 1947);
>
> *Montgomery v. Virginia Stage Lines,* 191 F. 2d 770, 772 (D. C. Cir., 1951);
>
> Accord, *Chicago, Rock Island & Pacific R. R. v. Lint,* 217 F. 2d 279, 285 (8th Cir., 1954).

In the present case, the court included in its instructions a rather lengthy and highly inflamatory extract from the First Amended Complaint (R. 1236-39). There was absolutely no evidence in the record to support many of of the allegations so included in the court's charge. Flintkote was, under those circumstances, at least entitled to

have the court present to the jury a correct and specific statement of the law applicable to Flintkote's theory of the case, which theory found ample support in the evidence.

> "In a proper case, a party may be entitled to have his theory submitted to the jury, when there is evidence to support it and a proper request therefor has been made. . . . However, such a charge should be judicial and not one-sided or argumentative; and when the judge instructs as to one party's theory, he should also instruct as to the other party's contentions. U. S. v. Messinger, 4 Cir., 68 F. 2d 234; State Automobile Mut. Ins. Co. v. York, 4 Cir., 104 F. 2d 730; Home Ins. Co. v. Consolidated Bus Lines, 4 Cir., 179 F. 2d 768."
>
> *Paramount Film Distributing Corp. v. Applebaum, supra,* 217 F. 2d at 123.

5. The Court Failed to Instruct Adequately on the Burden of Proof.

(Specifications of Error Nos. 9 and 10, pp. 30-31.)

The court erred in failing to instruct the jury with regard to the burden of proof substantially as set forth in defendant's proposed instructions numbers 14(new) and 42. The court instructed on burden of proof on two separate occasions (R. 1234 and R. 1255). It is not contended that those instructions were not substantially correct as abstract statements of the law. Flintkote's position is that the burden of proof of all issues in this case was on plaintiffs, and the court should have so stated. The court's instructions were phrased in terms of the burden of proof being on the party "who asserts the affirmative" (R. 1234, 1255). That was correct, but it was incomplete without a statement that *plaintiffs* asserted the affirmative on all issues. See, *e.g.,* Instruction 116, BAJI.

The discussion and authorities appearing at pages 88 to 89, *supra,* are equally applicable to the court's failure to amplify its correct generalized instruction on burden of proof by instructing that plaintiff had that burden as to all issues and specifically that plaintiffs had that burden with regard to damages.

It has been specifically recognized that a party has a right either to have a specific instruction placing the burden of proof on the particular party having the affirmative of the question, or to have the question so framed that the jury would necessarily understand that the same should be answered affirmatively only in the event the testimony preponderated in favor of such answer, and absent such preponderance, in the negative.

> *Psimenos v. Huntley,* 47 S. W. 2d 622, 624 (Tex. Civ. App., 1932).

Defendant requested a single instruction stating that plaintiffs had the burden of proof on all issues. Defendant's other instructions in the main were predicated upon the giving of such an instruction. The court's instructions did not separately place the burden of proof on plaintiffs as to each issue.

The proper and plain placing of the burden of proof "is not idle ceremony"; "its office is important," and, indeed, "indispensable in the administration of justice."

> *Boswell v. Pannell,* 107 Tex. 433, 180 S. W. 593, 595 (1915).

Although it is possible that the jury correctly understood that the court was referring to the plaintiffs when it referred in the abstract to the party "who asserts the affirmative," the possibility that the jury understood otherwise in respect of some issues in the case is equally sub-

stantial. An instruction that the burden of proof was on *plaintiffs* would not have been misunderstood. Defendant was entitled to nothing less.

Pertinent by way of analogy is a statement by the court in

Paramount Film Distributing Corp. v. Applebaum, supra, 217 F. 2d at 105:

> "In a case of this kind, if the jury finds that the plaintiff is entitled to recover at all, the statute permits the trebling of the amount as a penalty, and to that extent, it partakes of the nature of a criminal charge, for which reason, it would seem, the proof should be stronger than in an ordinary civil action Hence, the trial court should impress upon the jury as clearly as possible the meaning of the phrase 'preponderance of the evidence.'"

It is submitted that the court erred in failing to instruct substantially as requested by Flintkote.

6. Each of the Foregoing Errors Was Substantial and Prejudicial and the Judgment Should Be Reversed.

Each of the errors discussed in the preceding portions of this section of this brief was substantial and prejudicial. Each of the errors might have provided the basis for the verdict; none was patently harmless. Flintkote contends that there was no evidence to support the verdict (pp. 46 to 60, *supra*) and that in any event the verdict was against the weight of the evidence (pp. 92 to 99, *infra*). We believe it is apparent that the jury's verdict must have been based either on a misconception of the applicable law or upon passion and prejudice. Even if this Court should not agree with us that any one of these errors in the instructions deprived defendant of a fair trial, certainly the

aggregation of all of those errors into a single charge to the jury made the whole of that charge grossly erroneous and exceedingly prejudicial and compels the reversal of the judgment and a new trial of the action.

C. The Court Abused Its Discretion in Refusing to Grant the Motion for a New Trial Based on the Ground That the Verdict Was Against the Weight of the Evidence.

(Specification of Error No. 11, p. 31.)

We have argued, in an earlier section of this brief, that the Court erred in denying defendant's motion to set aside the jury's verdict and to enter judgment for the defendant. There we attempted to show that even after resolving every doubt in plaintiff's favor, there was no evidence to support the implied findings that must have been made if the verdict is to stand—that Flintkote knowingly participated in an unlawful conspiracy in restraint of trade that injured the plaintiffs. We shall not repeat that argument here. If the Court agrees with us, then the judgment should be reversed and judgment should be ordered for defendant and no question of a new trial need be considered.

But even if this Court should take the view that there was enough evidence in the record to prevent the direction of a verdict, the clear weight of the evidence was so overwhelmingly in defendant's favor that it was the plain duty of the trial court to grant a new trial and its refusal to do so constituted an abuse of discretion.

Much time during the trial was devoted to the presentation of evidence relating to the activities of certain of the contractors in connection with bidding on public jobs. As we have previously pointed out, the Court overruled defendant's objection that this testimony should not have

been received until Flintkote was in some way connected with it, and denied a motion to strike it thereafter. While the activities of some of the contractors were such as to indicate the possible existence of a conspiracy to fix prices and allocate certain jobs, there was no evidence, as we have pointed out in the first section of the argument, that Flintkote in any way participated in such a conspiracy, nor, we submit, was there any evidence that Flintkote knew of its existence.

We have heretofore stated our reasons why plaintiff Waldron's supposed statement at the second Manhattan Supper Club meeting (R. 197) that the acoustical contractors were organized and "weren't competing with each other any more" could not be construed as notice of the existence of any conspiracy. But the record will not support a finding that the statement was made at all. Waldron did not remember making that statement when his deposition was taken in October of 1952 (less than a year after the statement was supposedly made), nor did he mention it when his deposition was taken only a week before the trial (R. 347), and then he quite conveniently, and for the first time, claimed he remembered it over three years later when he was on the witness stand. This sudden flash of alleged memory is unbelievable. Even the willing Lysfjord (who was forced to admit he is quite capable of giving false testimony if it serves his purposes (R. 638)), did not purport to remember that Waldron had made any such statement. The other persons at the meeting, Thompson (R. 1033), Baymiller (R. 945-46), and Ragland (R. 790), testified that no such statement was made. It would seem that the evidence of three persons whose veracity is unimpeached and the failure of one of the plaintiffs to recall, should more than override the last-minute supposed recollection of a single interested witness.

There is likewise no evidence that there was any combination, agreement or concert of action between Flintkote and the Flintkote contractors to cut off relations between Flintkote and the plaintiffs. Of course there were complaints by the contractors that a new Flintkote account should be established in Los Angeles without prior notice to them. It would be unbelievable if it were contended that no such complaints were made. But the record stands uncontradicted that Flintkote made no promise or agreement to cut off the plaintiffs, and its representatives unequivocally stated they would take such action, if any, as Flintkote in its own discretion deemed best. See the testimony of Harkins (R. 1066), Krause (R. 1125-26, 1128), Howard (R. 1152), Lewis (R. 1047), Baymiller (R. 951). There is no evidence of any combination or conspiracy among the Flintkote contractors to force Flintkote to discontinue selling tile to plaintiffs—and even if there were such a combination—there is no evidence that Flintkote knowingly joined it. Therefore, even if it be concluded that Flintkote had no purpose, motive or reason to cut off the plaintiffs other than to maintain friendly relations with its older customers, or even if Flintkote feared that it might suffer adverse economic consequences if it did not cut off relations with plaintiffs, this still would not prove participation in a wrongful conspiracy.

We have discussed at length the necessity for finding that Flintkote knew that a conspiracy existed among the contractors before any liability on Flintkote's part could be found. Knowledge by Flintkote is an initial prerequisite to a finding of liability. Knowledge is not, however, the ultimate fact which is determinative of liability. The ultimate fact is whether Flintkote's motive in cutting off plaintiffs was to join in, or act in furtherance of, a conspiracy among the contractors. Obviously Flintkote could

not knowingly join a conspiracy of the existence of which it was unaware. But even if it were found that Flintkote *did* know that a conspiracy existed among the contractors, it would be necessary to find further that Flintkote was motivated by that knowledge and intended to join in the contractors' conspiracy when it cut off plaintiffs. It is submitted that there is no evidence in the record from which a reasonable person could conclude that Flintkote had the requisite motive, and further there is ample and convincing testimony showing that Flintkote's motive in cutting off plaintiffs was not to join in any conspiracy among the contractors, but was to terminate relations with a contractor who did not live up to its representations. The uncontradicted testimony is that the decision to cut off the plaintiffs was made by Harkins, and his testimony is that his motive was to dispose of a contractor he could not trust (R. 1071). How can Flintkote's motive be any different from Harkins'? Besides, every other Flintkote representative who had anything to do with the cut-off testified to the same effect: Ragland (R. 810), Baymiller (R. 953), Thompson (R. 1036-37), and Lewis (R. 1047).

It is only in connection with Flintkote's motive in cutting off plaintiffs that the testimony about the deal between plaintiffs and Flintkote becomes relevant. If plaintiffs were not entitled to do business generally at Los Angeles, Flintkote would have a compelling business reason for cutting off plaintiffs, and this would further support Flintkote's testimony that it cut off plaintiffs for a reason other than to join a conspiracy among the contractors.

The evidence respecting the original deal between Flintkote and plaintiffs is sharply conflicting. If this were an action based on contractual relations between Flintkote

and the plaintiffs, there is certainly enough evidence in the record to justify a finding:

1. That plaintiffs were to do business in San Bernardino and not in Los Angeles; or

2. That plaintiffs were to do business both in San Bernardino and Los Angeles; or

3. That there was no actual meeting of the minds, and that there was a misunderstanding between plaintiffs and defendant, plaintiffs thinking they were to do business in both places, and defendant thinking that plaintiffs were to do business only in San Bernardino and not in Los Angeles.

But this is not an action on the contract. The important thing here is not what the deal was in fact, but what the Flintkote representatives thought the deal was. Proposition (3) supports Flintkote just as much as proposition (1) for this purpose. The overwhelming weight of the evidence is that the Flintkote people at least intended and believed that plaintiffs were entitled to do business generally only in the San Bernardino area. There are certain undisputed facts which point almost irresistibly to this conclusion:

1. The first shipment of tile was sent to San Bernardino (R. 355). Part of it was later "back hauled" into Los Angeles (R. 391-92), but there is no evidence that Flintkote knew anything about this. If this was to be in part a Los Angeles operation, it would seem that at least a substantial part of the initial shipment would have been sent to Los Angeles.

2. The first shipment was paid for by a check drawn on a San Bernardino bank. The funds for that check were made available by a deposit made by plaintiffs the very day it was drawn of a check on plaintiffs' account in a Los

Angeles bank (R. 378-80). If plaintiffs were to do business in Los Angeles, why not use the Los Angeles check to pay Flintkote in the first place? The only reasonable purpose of such an operation would be to indicate to Flintkote that this was a San Bernardino business and to conceal, or at least not emphasize, the existence of a Los Angeles bank account.

3. Flintkote wrote a letter on January 17, 1952 (*ante litem motam*) to the Louis A. Downer Company of Riverside, stating, among other things:

> "This company, while offering no exclusive franchise agreement, have recently placed the acoustical tile line in the Riverside and San Bernardino area with the aabeta company *of 901 Waterman Avenue, San Bernardino.*" (R. 245). (Emphasis ours.)

If Flintkote believed that plaintiffs were to operate in both cities that reference would be made to the "aabeta company of Los Angeles and San Bernardino" and not merely San Bernardino.

4. Mr. Ragland's report to Mr. Harkins of February 15, 1952 (Deft. Ex. "I"), refers to "the aabeta company of San Bernardino." This document, also made before there was any litigation or threat of litigation, would not have referred to "the aabeta company of San Bernardino" if Flintkote thought that company was to be in both cities. Indeed the only purpose of the report is to verify the fact that plaintiffs were taking orders for jobs in Los Angeles without having previously notified Flintkote. If Flintkote believed they were entitled to be in the Los Angeles territory, why investigate the matter at all? The fact that the report was called for is consistent only with a *bona fide* belief by Harkins, who made the decision, that plaintiffs were not to operate in Los Angeles. Any other

finding necessarily requires one to conclude that the report was a deliberate fiction contrived after the event.

5. It is undisputed that Flintkote did not give any prior notice to the three contractors handling Flintkote tile in the Los Angeles area that arrangements had been made to supply tile to plaintiffs. This conduct would be quite inexplicable if Flintkote had intended to establish a fourth distributor in the Los Angeles area.

6. It is undisputed that when the Flintkote contractors complained to Flintkote about the plaintiffs' entering the Los Angeles field, the Flintkote representatives immediately and uniformly stated that the plaintiffs were supposed to operate only in the San Bernardino area: Krause (R. 1127), Howard (R. 1151). These discussions also took place before litigation had commenced, and it is fantastic to suggest that this statement as to Flintkote's purposes could have been contrived in advance of the litigation as a motive for the termination and that there was a gigantic combination to give perjured testimony at the trial.

7. It is undisputed that at the termination meeting, Mr. Thompson gave as a reason for the cut-off the fact that the plaintiffs were doing business in Los Angeles: Ragland (R. 810), Baymiller (R. 953), Thompson (R. 1037-38), and even Waldron (R. 239, 361). Lysfjord's account of the termination meeting cannot be relied upon in view of his admittedly false testimony in connection therewith (R. 638). Here again it is inconceivable that plaintiffs' Los Angeles activities would be given as a reason for the termination (again before there was any litigation) unless it was Flintkote's understanding that plaintiffs were not entitled to operate in that territory.

To summarize: there is no evidence in the record from which one may reasonably conclude that Flintkote know-

ingly participated in a conspiracy among the acoustical contractors. On the other hand, there is an abundance of substantial and convincing evidence (1) that even if there was such a conspiracy, Flintkote knew nothing about it; (2) that Flintkote at no time participated in any conspiracy in restraint of trade; and (3) that its motive in cutting off the plaintiffs was the legitimate business reason that the plaintiffs had violated what Flintkote believed to be the understanding reached when business relations were commenced between defendant and plaintiffs as to where plaintiffs' operations were to be conducted.

It seems obvious either (1) that the jury misconstrued the issues and somehow concluded that if the contractors were parties to a conspiracy, that fact alone justified a verdict against Flintkote, or (2) that the jury was motivated by passion and prejudice. To permit this verdict to stand would constitute a gross miscarriage of justice. We believe this Court will conclude that judgment for defendant should be ordered; but in any event, that the verdict must be set aside as against the weight of the evidence and that the case should be sent back for a new trial.

III.

The Damages Were Excessive. Numerous Errors Were Committed in Connection Therewith.

Although Flintkote's position is that it did no wrongful act and that no wrongful act by it has been proved, any discussion of damages must necessarily assume that some grounds for awarding the damages have been shown. References, therefore, to wrongful acts by Flintkote or to participation by Flintkote in a conspiracy in the course of the following discussion do not admit that either a wrongful act or participation in any conspiracy has been or could be proved in the present case.

We complain of three major errors in connection with damages:

(1) The Court permitted proof to be made of, and wrongly instructed the jury to permit recovery for, damages resulting from acts done subsequent to the commencement of the action.

(2) The Court permitted "estimates" to be accepted as evidence which were no more than unsupported speculations of the plaintiffs; and

(3) The Court refused to grant a new trial although the verdict was greatly in excess of any figure that could possibly be justified by the evidence.

We shall cover these points in the order stated.

A. The Court Improperly Instructed the Jury and Improperly Admitted Evidence as to Damages Resulting From Acts Done Subsequent to the Commencement of the Action.

(Specifications of Error Nos. 12 and 13, pp. 31-34 and 34-43.)

The Court misconceived the period for which damages were recoverable in this action and thereby erred in two respects: (a) it refused to give the correct instructions proposed by Flintkote and erroneously instructed the jury that plaintiffs could recover damages proximately caused by plaintiffs' inability to buy acoustical tile from Flintkote on a direct basis during the period February 19, 1952 to the date of the trial; and (b) it erroneously admitted into evidence, over Flintkote's objection, certain testimony and exhibits which related to alleged injury to plaintiffs (and damages resulting therefrom) by reason of their inability to buy acoustical tile from Flintkote on a direct

basis during the period encompassed in the Court's instruction.

Plaintiffs are entitled to recover in this action all damages (without regard to date of accrual) from injuries proximately caused by wrongful acts for which Flintkote is responsible and which were committed prior to the filing of this action. But plaintiffs may not recover in this action any damages for injuries caused by wrongful acts committed subsequent to the filing of the action.

> "Damages accruing since the action began were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on. This was correct."
>
> *Lawlor v. Loewe,* 235 U. S. 522, 35 S. Ct. 170, 172 (1915).

> "Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was commenced."
>
> *Connecticut Importing Co. v. Frankfort Distilleries,* 101 F. 2d 79, 81 (2d Cir., 1939).

All of the injury for which plaintiffs seek to recover damages arose out of the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis. There is no hint of any other source of injury to plaintiffs' business or property.

The critical question, then, is whether plaintiffs' inability to purchase acoustical tile from Flintkote up to the time of trial was the result of a single act or of a series of acts. If it arose out of a single act, plaintiffs were entitled to recover all damages proximately resulting therefrom, and the court was correct. If the inability was a continuing matter and arose out of a series of acts

(express or implied), plaintiffs were entitled to recover only damages proximately resulting from so many of those acts as occurred prior to the filing of the complaint.

Flintkote's conduct in refusing to sell to plaintiffs cannot properly be characterized as a single act. On or about February 19, 1952, Thompson told plaintiffs that *in the future,* Flintkote would not sell to plaintiffs. That statement constituted no more than an indication of Flintkote's then intention not to deal further with plaintiffs. There was nothing irrevocable about the action. Flintkote was not precluded from changing its position at any time and commencing to deal with plaintiffs. Any specific refusal to deal, by its very nature, can constitute no more than a refusal to deal at the time of the specific refusal. Persistence in a course of conduct of non-dealing is therefore necessarily a series of refusals to deal. The refusals may be express, as where an actual demand and refusal occur, or implied, as where the circumstances indicate that demand would be futile. It can probably be properly inferred from the announcement of intention that Flintkote would persist in its announced course of conduct, and Flintkote has admitted that it did so (R. 44-45), but such persistence does not transmute the series of acts embodied in the course of conduct into a single act.

No injury at all resulted from the mere announcement by Thompson that Flintkote would no longer sell to plaintiffs; plaintiffs had no contractual right to purchase tile from Flintkote which would have been anticipatorily breached by Thompson's announcement. There is nothing in the evidence to indicate that plaintiffs wanted to buy any tile at the time the announcement was made. Such injuries as plaintiffs sustained arose out of Flintkote's failure to sell tile to them at such time or times as they

needed and wanted it or were in a position to buy and use it. Obviously plaintiffs sought to recover damages for injuries sustained from not one, but a series of separate occurrences. The fact that the occurrences were negative and implied in fact does not change their separate nature.

That continued refusal to deal constitutes a series of acts rather than a single act was clearly recognized in the following cases:

Connecticut Importing Co. v. Frankfort Distilleries, supra;

Frey & Son v. Cudahy Packing Co., 243 Fed. 205 (D. Md. 1917), *reversed* on ground that no combination in restraint of trade proved, 261 Fed. 65 (4th Cir., 1919).

The decision in the *Connecticut Importing Co.* case is directly in point. There, plaintiff recovered a judgment for treble damages in a suit brought under the Sherman Antitrust Act and tried to a jury. Plaintiff was a distributor in Connecticut for products manufactured by Frankfort Distilleries, one of the defendants. The other defendants were distributors of the same products in Connecticut. Plaintiff refused to conform to an agreement to maintain fixed prices. As a consequence, Frankfort Distilleries refused to supply plaintiff with Frankfort products. On the question now at issue in this case, the Court said:

> "Neither do we find any error on the plaintiff's appeal. The recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. Frey & Son, Inc. v. Cudahy Packing Co., D. C. 243 F. 205. Damages which accrue after the suit is brought cannot be recovered in the action unless they are the result of acts done before the suit was com-

menced. Lawlor v. Loewe, 235 U. S. 522-536, 35 S. Ct. 170, 59 L. Ed. 341. Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before suit was brought, they would be purely speculative." (101 F. 2d at 81.)

Frey & Son v. Cudahy Packing Co., supra, was an action for treble damages under the Sherman Act. In connection with fixing the proper period to be considered in assessing damages the court said, at pages 205-206 of 243 Fed.:

". . . it has long been established that the plaintiff can recover only for such damages as were the consequences of what the defendant did before suit was brought, although it is immaterial whether the effect of what was done showed itself before or after the bringing of the suit, as, for example, where the thing complained of is a tortious injury to the person or property from some particular act, the plaintiff may recover for any damage which manifests itself up to the time of the verdict. On the other hand, where the injury sued for is caused by a mere repetition or continuation of acts of the same class as that for which the suit was brought, the plaintiff's recovery is limited to the damages resulting from such of those acts as were done before the bringing of the suit. . . .

> "In this case the only damage proved by the plaintiff was the loss of profits it would have made on resales of Old Dutch Cleanser, if it had been able to buy Old Dutch Cleanser at the price at which other jobbers could obtain it. Such damage is a damage which occurs from day to day, and the damage on one day is not the necessary result of an act done by the defendant at an earlier date."

In *Savannah Theatre Co. v. Lucas & Jenkins*, 8 F. R. Serv. 34.12, Case 2 (S. D. Ga. 1944), plaintiff brought an action under the antitrust laws complaining about defendant's refusal to grant plaintiff an adequate supply of suitable films to exhibit in its theatre. Plaintiff sought by supplemental complaint to allege the continuance of the conspiracy beyond the date of the filing of the complaint, and to recover damages incidental to such continuance. The court disallowed the supplemental complaint, saying:

> "As concerns the alleged continuing conspiracy, it appears that while damages accruing since the action was instituted are allowable, they must be suffered in consequence of acts done before the institution of the suit and constitute a part of the cause of action declared on. Therefore the question of the continuance of the conspiracy and damage resulting from such acts in pursuance thereof subsequent to the filing of the suit are not recoverable in this action [*sic*]."

In *Bordonaro Bros. Theatres v. Paramount Pictures*, 203 F. 2d 676, 677 (2d Cir. 1953), Judge Clark thus described the situation there presented:

> "This is a continuance of the litigation which we considered in Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., 2 Cir., 176 F. 2d 594. Plaintiff there had recovered against defendants for violation of the antitrust laws, 15 U. S. C. §§1, 2, 15, injuring it in its operation of the Palace Theatre in

> Olean, New York, for the period up to the time of commencement of that action, September 16, 1946. The present suit was brought to recover its later damages from September 16, 1946, until March 14, 1948."

In the two following cases, relating to failures to supply motion pictures on suitable runs and clearances on a continuing basis, the damages were limited (in fact, but without discussion) to those accruing by reason of plaintiff's failure to obtain appropriate films prior to the filing of the complaint.

> *William Goldman Theatres v. Loew's*, 69 F. Supp. 103 (E. D. Pa., 1946), *affirmed*, 164 F. 2d 1021 3d Cir.), *cert. denied*, 334 U. S. 811, 68 S. Ct. 1016 (1948);
>
> *Milwaukee Towne Corp. v. Loew's*, 190 F. 2d 561 (7th Cir. 1951).

It follows that the maximum limit of plaintiffs' recovery in the instant case would be damages for such injuries as were proximately caused by Flintkote's refusals (express and implied) to sell acoustical tile to plaintiffs prior to the commencement of the action (July 21, 1952); or, as stated in Flintkote's requested instructions numbers 46 (e) and 46(f) (which were refused):

> "(e) Plaintiffs' recovery in this action, if any, must be limited to damages resulting from the inability of plaintiffs to purchase acoustical tile from Flintkote on a direct basis during the period February 19, 1952, to July 21, 1952.
>
> "(f) Plaintiffs cannot recover in this action any damages which may have resulted from their inability to obtain acoustical tile from the defendant Flintkote on a direct basis during any period commencing on or after July 21, 1952."

The court was wholly wrong, therefore, when it admitted testimony and exhibits relating to damages allegedly resulting from plaintiffs' inability to purchase acoustical tile from Flintkote after the filing of the complaint and through the commencement of the *trial* of the action, May of 1955, and in instructing the jury that its verdict could reflect damages resulting from plaintiffs' inability to buy tile from Flintkote during all of that period.

In addition to being erroneous because they allowed the jury to find damages beyond the maximum period for which damages could be recovered in this action, the court's instructions that damages could be awarded for plaintiffs' inability to buy tile from Flintkote up to the time of the trial and its action in admitting evidence of such damages were erroneous for the reason that there was no evidence tending to show sufficient wrongful acts by Flintkote to entitle plaintiffs to such damages.

Plaintiffs can only recover damages for injuries resulting from "anything forbidden in the antitrust laws." (15 U. S. C. A. §15.) The antitrust laws forbid refusing to sell only when such refusal is pursuant to a knowing participation in an unlawful conspiracy. (See discussion at pages 48-50, 53, 58-59, *supra.*) Persistence in a course of conduct of non-dealing involves a series of separate acts. (See discussion at pages 102-105, *supra.*) Therefore plaintiffs could recover damages only for injuries resulting from so many of the acts in the series as were proved to have been pursuant to knowing participation in an unlawful conspiracy.

Bordonaro Bros. Theatres v. Paramount Pictures, supra, was an action to recover damages for alleged violations of the antitrust laws. The plaintiff had theretofore recovered its damages accruing prior to September 16,

1946, the date of commencement of a prior action. The present suit was brought to recover its damages accruing subsequent to that date by reason of the continuation of the prior practices. In connection with proof of the continuation of the conspiracy, the court said:

> "Nor do we think that award vitiated by errors on the part of the trial judge. The first assigned error was the refusal of binding instructions in favor of the plaintiff based on the finding of conspiracy in the previous case. But the judge properly—we might say inevitably—ruled that the plaintiff must prove that the conspiracy continued from 1946 to 1948, and so charged. The judge actually went far in the plaintiff's favor when he told the jury that the former judgment 'is conclusive proof that there was a conspiracy between the defendants prior to September 16, 1946,' . . ." (203 F. 2d at 678.)

In this case there was no proof that any conspiracy which might have provided the motive for Flintkote's announcement that it would no longer deal with plaintiffs continued beyond February 19, 1952. All witnesses called by Flintkote testified that there never was any such conspiracy. The only evidence whatsoever respecting the continuance or ending of any conspiracy was Lysfjord's testimony (R. 648, 675, 678-79) that any conspiracy which may have existed among the contractors had ended by May or June of 1952. There was no evidence that any conspiracy existed among the acoustical contractors after that time. Thus, Flintkote's refusals to sell tile to plaintiffs after that date could not have been in furtherance of or pursuant to a knowing participation in an unlawful conspiracy and thus could not have been "anything forbidden in the antitrust laws", and plaintiffs could not have been entitled to any damages resulting therefrom. It follows,

then, that any evidence of damages resulting from inability of plaintiffs to buy acoustical tile from Flintkote after "May or June" of 1952 was wholly irrelevant to any cause of action which the evidence might conceivably be thought to sustain.

From the foregoing, it should be apparent that the court's action in instructing the jury that it could award all damages resulting from plaintiffs' inability to buy acoustical tile from Flintkote "during the period February 19, 1952 to the time of the beginning of this trial", in admitting evidence tending to prove such damages and in failing to give defendant's requested instructions numbers 46(a) through 46(e) was erroneous in two basic particulars: (1) it allowed the jury to award damages to plaintiffs for injuries resulting from acts done and on causes of action arising (if at all) after the commencement of the action; and (2) it allowed the jury to award damages to plaintiffs for injuries resulting from acts which were not proved to be wrongful by any evidence whatsoever.

That the error was substantial and prejudicial should be obvious, since it extended the maximum period for which plaintiffs could recover from five months to thirty-nine months (almost eight-fold), permitted introduction of evidence about estimated sales of "one and one-half and two cars a month", and generally permitted introduction of testimony which magnified the alleged damages resulting to plaintiffs beyond all reason and during a period entirely irrelevant to the case at bar.

B. The Court Permitted Evidence to Be Introduced Which Allowed Damages to Be Based on Speculation.

(Specification of Error No. 13, pp. 34-43.)

The record is clear that the testimony of the witnesses and the portions of exhibits 38 and 39 relating to damages based on lost profits were pure unwarranted speculation of interested witnesses and were without any foundation in fact. Each of the plaintiffs testified he estimated that plaintiffs would have sold a carload of tile per month in 1952, one and one-half carloads per month in 1953, and two carloads per month in 1954 (Lysfjord: R. 629, 630; Waldron: 687-88.) The basis for Lysfjord's testimony in that respect is found at R. 628-29 as follows:

> "Q. (By Mr. Ackerson): What is the basis for your computation of the second line there, beginning with 'During the first year of business,' and so forth? A. Because in some time past I had been selling a carload or more, generally more than that a month, for the R. W. Downer Company.
>
> Q. What basis do you have for assuming that you could have done that for yourself? That is the purpose of your statement, isn't it? A. I can't see any reason in my mind that I shouldn't be able to do as well for myself as working for somebody else. I surely would work as hard or probably twice as hard for myself as for anybody else.
>
> Q. Would you have had the same contacts for yourself as you had with the Downer Company? A. I most certainly would."

No testimony was offered to indicate that Waldron's testimony had any basis other than wishful thinking. There is nothing in the record to indicate that plaintiffs were experts on business prognosis for a new venture. There

is not one fact in evidence or adverted to in any way in the Record which might justify plaintiffs' gratuitous assumptions regarding the possible size and growth of their business. *Plaintiffs'* business had no history on which any intelligent prognosis could be based. There was no evidence to show that plaintiffs' business was comparable to that of anyone else, or that the history of the other business was used as a basis for estimates about the future of plaintiffs' business. There was no evidence that plaintiffs had ever been connected with the management of any business, much less a *new* business or a new acoustical tile business. Waldron expressly testified he had no experience on which to base his opinion (R. 711-12). In fine, there is nothing in the record to show that plaintiffs were qualified to estimate the growth of their business or that, even if qualified, they had any basis for their estimates.

The calculations by which lost profits were derived from estimated gross sales were similarly without any foundation in the evidence or any showing that plaintiffs were qualified, by experience or otherwise, to make the assumptions upon which those calculations rested. The basic assumption was that plaintiffs would realize a net profit of 20 percent of gross sales (Lysfjord: R. 627). Apparently that was on the theory that the Downer company paid its salesmen 10 percent of the gross sales and retained a net profit of 10 percent; but plaintiffs would not have to pay salesmen and so would take 20 percent net profit (Lysfjord: R. 626-27). The assumption that plaintiffs would do as well in business as the Downer company was wholly unwarranted. There is no evidence that plaintiffs had the finances, labor force, or inherent ability to do so. There is nothing to indicate that plaintiffs

could operate as efficiently as the Downer company (or that plaintiffs even knew how the Downer company operated).

It is thus apparent that there was no basis for any of the material appearing in exhibits 38 and 39 relating to estimated future profits or for any of the plaintiffs' testimony in respect of the calculations therein. It is submitted, then, that the testimony and exhibits were utterly incompetent, had no probative value, constituted nothing but speculation and wishful thinking, and should not have been admitted into evidence.

Exhibit 43 and Waldron's testimony with respect thereto (R. 689-92) consisted of an assumption that the net profits of plaintiffs' business over the period January 1, 1952 to January 1, 1955 would have equaled 72 times the monthly income of both plaintiffs at the end of their employment by the Downer company. There is absolutely nothing in the record to support that assumption. This exhibit, and the testimony in connection with it likewise should not have been admitted.

A rather full discussion of this problem in a generally similar situation is found in

United States v. Griffith, Gornall & Carman, 210 F. 2d 11 (10th Cir., 1954).

This was an action by a contractor for damages caused by flow of rain water from a government air base onto a pipeline under construction. Included in the plaintiff's claim was a demand for loss of profits. The trial court excluded certain evidence as based on pure speculation. Other evidence as to lost profits was admitted. The Court of Appeals held that all of the testimony on the subject should have been rejected.

The court recognized that the *fact* of damage must be proved to a certainty; that while the *amount* need not be proved with mathematical exactness, the evidence to be accepted must form the basis for a reasonable approximation, and mere speculations and guesses can have no probative value.

The following extract from the opinion deals with this point (210 F. 2d at 13, 14):

> "To prove loss of profits and damage to its business, the plaintiff relied exclusively upon the tesimony of its president. He testified that the corporation had been in existence since 1946 and that he thought it had made 'something close to $80,000.00 of profit' during those years, which 'amounts to about $1,000.00 a month during the time' that it was actively doing work. He stated that he believed that the plaintiff would have earned approximately $5,000.00 during the time that was required to make the repairs. The court excluded this evidence as speculative.[2] . . . What the loss of profits or damage to plaintiff's business would be, if any, is pure guess work on the part of plaintiff's president and far too speculative to sustain a judgment for this claim. The language used by the trial court as quoted in note 2, is applicable to all the evidence which was introduced to sustain the claim for special damages."

The remarks of the trial judge as reported in the footnote mentioned in the above quotation were as follows:

> "Now, I don't see any materiality to that, what they did some other year. As a matter of fact, this whole thing is highly speculative. The fact is they didn't have any other contracts. They might have obtained a contract if they had been on it and they might not. They might have made a profit on it

> if they had been on the contract and gotten the contract and they might not. As a matter of fact, if these people are reimbursed for their materials that they had to lay out as a result of this damage, for the payroll that they had to meet as a result of this damage, how can you claim anything more? You can't claim that they would lose something. All you can claim is that they might have made a profit if they had not been working on this job and if they had gotten another job to do. I don't think that is admissible; I think it is speculative. Certainly in comparison with what they earned in 1950. I don't see that."

The foregoing discussion demonstrates that the court erred by receiving in evidence plaintiffs' exhibits 38, 39 and 43 and the testimony which they purported to summarize. The exhibits, except as related to increased prices paid for acoustical title (in which they were grossly inaccurate) were not really evidence at all. They were mere demands for large sums of money and their admission into evidence put in the jury's hands documents showing big figures unrelated to any relevant facts. By their very admission, the jury may well have gotten the impression that they bore the seal of approval of the court. The exhibits and the related testimony not only were objectionable as based on pure speculation; they were in part based on an erroneous damage period and should also have been excluded on that ground. (See preceding section.) The trial court's error in this respect was largely responsible for the grossly excessive verdict.

C. The Court Abused Its Discretion in Failing to Grant a New Trial on the Ground That the Damages Fixed by the Jury Were Excessive.

(Specification of Error No. 11, p. 31.)

The portions of the statutory authorization for this action pertinent to the question of damages are as follows:

> "Any person injured in his business or property . . . may . . . recover threefold the damages by him sustained, . . ."
>
> 15 U. S. C. A. §15.

Thus, to be successful the plaintiff must prove as a fact that he has been injured in his business or property and must also prove the extent of that injury and the amount of the damages required to compensate him therefor.

The fact that plaintiff has been injured (or fact of damage) must be proved without resort to speculation or guess work.[2]

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[2]". . . recovery cannot be had unless it is shown, that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture."

Keogh v. Chicago & N. W. Ry. Co., 260 U. S. 156, 164-165, 43 S. Ct. 47, 50 (1922).

". . . plaintiffs must show that, as a result of defendants' acts, actual damages were sustained— . . . These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures, or estimates. They must not be speculative, remote, or uncertain."

American Sea Green Slate Co. v. O'Halloran, 229 Fed. 77, 79 (2d Cir. 1915).

This Court's discussion of proof of injury with relation to specific facts prior to holding that injury in the form of lost profits was not shown in

Wolfe v. National Lead Co., 225 F. 2d 427 (9th Cir. 1955),

indicates this Court's firm enforcement of the rule requiring that injury (or the fact of damage) be proved by facts and not speculation, surmise or conjecture. The proofs submitted in that case and in the case at bar are

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"Damages must be actual, not speculative or conjectural."

Loew's v. Cinema Amusements, 210 F. 2d 86, 95 (10th Cir.), *cert. denied,* 347 U. S. 976, 74 S. Ct. 787 (1954).

"Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves."

Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 98 (8th Cir. 1901).

"The fact of damage itself is not subject to speculation."

McWhirter v. Monroe Calculating Mach. Co., 76 F. Supp. 456, 465 (W. D. Mo. 1948).

"It is generally held that the expected profits of a commercial business are too remote, speculative and uncertain to permit a recovery of damages for their loss. To warrant such a recovery, in other words, the proof must pass the realm of conjecture, speculation or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of loss can be logically and rationally drawn. Winter v. Haan, Mo. App., 211 S.W. 2d 544; Gildersleeve v. Overstolz, Mo., 90 Mo. App. 518; Central Coal & Coke Co. v. Hartman, 8 Cir., 111 F. 96; Ellerson v. Grove, 4 Cir., 44 F. 2d 493; Keogh v. Chicago & Northwestern Railway Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183."

Fireside Marshmallow Co. v. Frank Quinlan Const. Co., 213 F. 2d 16, 18 (8th Cir. 1954).

analogous and this Court's analysis in the *Wolfe* case is exceedingly pertinent here.[3]

A little more latitude is permitted to the finder of fact in the matter of the measure of the damages sustained, and "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."

Bigelow v. RKO Radio Pictures, 327 U. S. 251, 264, 66 S. Ct. 574, 579-80 (1946).

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[3]"Moreover, aside from the fact that the method of gross profits used by appellants is not a criterion of injury in this case, appellants are foreclosed from recovery because of other considerations. In the first place, they assume that they would have received larger quantities of titanium except for the alleged conspiracy; but there is no evidence that they would have, or that they were entitled to larger quantities than they actually received. They further assume, without proof, that the conditions of supply and demand in titanium pigments were the same in 1949 as in preceding years; and they likewise assume, without evidence, that the market conditions for paints were the same. In addition, there is no evidence that they would have manufactured and sold more paint in 1947 and 1948 if they had received greater amounts of titanium pigment. It appears that other pigments could be, and were, used as substitutes for titanium; and appellants admitted that they were able to get all of the ingredients to manufacture paint that they needed except titanium pigments. In fact, they purchased immense quantities of one of such substitutes, lithopone, in 1948, buying 403,050 pounds of it in that year. They could not have been injured by their failure to secure all the titanium pigment they wanted, if they were able to obtain all they could use of a substitute in the form of lithopone. It is true that appellants claim that lithopone was not a fair equivalent of titanium pigment as it cost considerably more; and it appears that they paid $18,400 more for it during the period in controversy than they would have spent for a comparable quantity of titanium pigment. However, if they passed this extra cost on to their customers, it would not result in any reduction in their profit; and there is no evidence that they did not pass it on. It is to be said that appellants also contend that the quality of their paint was lowered by the necessity of using lithopone rather than titanium; but there is no proof that they failed to sell any part of their paint production at a profit."

Wolfe v. National Lead Co., 225 F. 2d 427, 432 (9th Cir. 1955).

But even in cases where the *quantum* of the damage is impossible of precise determination and estimates thereof are required, there is no departure from the rule requiring precise proof of the fact of injury or any suggestion that the jury's estimates of the amount of the recovery may be without relevant factual support.

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."
>
> *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 562, 51 S. Ct. 248, 250 (1931).

Clearly, plaintiffs can recover damages for all injuries sustained by reason of the wrongful acts which form the basis of the suit, but in order to recover for any particular type of injury plaintiffs must prove that they were injured in that respect. It does not follow from a showing that plaintiffs were injured by increases in their out-of-pocket costs in certain respects that they were entitled to recover damages for profits lost by reason of business which was not done. Before plaintiffs can recover damages for lost

profits they must show that they were injured by losing business from which profits could have been obtained.[4]

It certainly would not be contended that if a personal injury plaintiff showed that he had suffered injuries by reason of a broken arm he would be able to recover damages in respect of a broken leg which he had not offered any proof had been broken as a result of the occurrence complained of or at all. The situation is identical in respect of injuries to a business. If plaintiffs can show that they were injured by having their out-of-pocket costs increased, they are entitled to recover for the increase in those costs. If plaintiffs can show that they were injured by having the value of their business diminished, they are entitled to recover for that diminution in value. If plaintiffs can show that they were injured by losing profits from business which they would have done but for the wrongful act or acts of the defendant, they are entitled to recover damages for those lost profits. But plaintiffs are not entitled to recover damages for any injuries which they have not clearly shown that they have suffered, and they must produce relevant data from which the amount of damages resulting from any injury proved may reasonably be estimated.

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[4]*Story Parchment Co. v. Paterson Parchment Paper Co., supra;*
Wolfe v. National Lead Co., supra;
American Sea Green Slate Co. v. O'Halloran, supra, note 2;
Fireside Marshmallow Co. v. Frank Quinlan Const. Co., supra, note 2;
United States v. Griffith, Gornall & Carman, 210 F. 2d 11 (10th Cir. 1954).

In this case, plaintiffs attempted to demonstrate and recover damages for three categories of injury to their business:

(1) Out-of-pocket expense at San Bernardino which resulted in no benefit to plaintiffs because they abandoned their San Bernardino premises following February 19, 1952.

(2) Out-of-pocket expenses in the form of the increased cost of acoustical tile purchased from sources other than Flintkote over what the cost would have been for equivalent title from Flintkote on a direct basis.

(3) Profits which plaintiffs would have realized from business which they would have done if they had been able to obtain acoustical tile from Flintkote on a direct basis.

Flintkote contends that the evidence will not support the verdict that plaintiffs were damaged in any combination of those respects in any sum approaching $50,000.

(1) Out-of-Pocket Expenses at San Bernardino.

Plaintiffs' evidence of out-of-pocket expenses at San Bernardino was adequate to prove both the fact of injury and the amount of the damages suffered thereby. The items of expense were apparently taken from plaintiffs' books and were satisfactorily definite and certain. That evidence would have supported a verdict for plaintiffs in the sum of $1920.

(2) Out-of-Pocket Expenses in the Form of Increased Cost of Acoustical Tile Actually Purchased.

Plaintiffs introduced certain testimony (summarized in exhibits 38 and 39) tending to show that, during the period January 1, 1952 to May 3, 1955, they paid $87,-808.97 for acoustical tile purchased from persons other than Flintkote and that they paid $12,758.57 more for that tile than Flintkote would have charged them for equivalent tile. It was conclusively demonstrated that plaintiffs' figures in this regard were inaccurate (R. 591, 592, 665-68, 702-03), and Flintkote objected to the admission in evidence of Exhibits 38 and 39 because of their erroneous nature (R. 692). Be that as it may, Flintkote definitely proved (Ex. K) that during said period plaintiffs paid $9,240.82 more for acoustical tile than Flintkote would have charged them for similar tile on a direct basis in carload lots and that plaintiffs' increased cost for such tile in the calendar year 1952 amounted to $1,594.75.

There was no evidence tending to show that plaintiffs bought any acoustical tile from anyone other than Flintkote prior to the filing of the complaint in this action, or that they paid any more for it than Flintkote would have charged them. Technically, then, there was probably no proof either of the fact of injury or the amount of damage in respect of increased cost of tile during the proper damage period, *i. e.*, prior to the filing of the complaint in this action. But perhaps the jury could have inferred that part of plaintiffs' increased tile cost in 1952 as incurred prior to the filing of the complaint, and, in that event, the fact of injury in the form of increased tile cost would have been proved and the jury would have been justified in assessing plaintiffs' damages by reason of said injury in some amount less than $1,594.75.

(3) Profits Which Plaintiffs Would Have Realized From Business They Would Have Done if They Had Been Able to Buy Tile From Flintkote.

In order to prove the fact of injury in the form of lost profits from business which they would have done if they had been able to purchase tile from Flintkote, plaintiffs had to show: *first,* that they would have done more business than they did do; *second,* that if they had done any additional business, they would have made a profit on it; and *third,* that their inability to buy tile from Flintkote was the proximate cause of their failure to do more business. It is submitted that the evidence cannot sustain any finding that the fact of such injury was so proved and provides no relevant data from which the amount of damages could be computed.

First, there was no evidence that if plaintiffs had been able to purchase acoustical tile from Flintkote on a direct basis they would have done any more business than they did.

(a) There was no substantial showing that any business was available which plaintiffs might have done. There was no substantial showing that any acoustical tile was sold by anyone other than plaintiffs. There was no showing that any of the general contractors with whom plaintiffs claimed to have contacts did any business requiring acoustical tile. There was no showing that any business was offered to plaintiffs and turned away by them.

(b) There was no showing, even if additional business was available, that plaintiffs bid on, negotiated for, or attempted to obtain it. (On the contrary, the only bid shown by the evidence to have been made was at a price

known to be unreasonably high and so high as to indicate that plaintiffs did not desire to have the contract awarded to them (R. 677).)

(c) There was no showing that if additional business was available and if plaintiffs would have attempted to get it, they would have been successful in having any contracts awarded to them. There was no showing that they would have bid suitable prices. There was no showing that any general contractors would have been willing to let contracts to a newly established firm without any history, record, or reputation and with only limited resources.

(d) There was no showing that plaintiffs had the resources to do any more business than they actually did. There was no showing that they were financially able to handle more business, that they had a suitable labor force to take care of increased business (or that such labor could have been obtained had it been required), or that they had the inherent ability to manage and operate a business of any greater magnitude.

Second, there was no showing that plaintiffs would have made a profit on any additional business if they had done it.

(a) There was no showing of the price at which contracts plaintiff might have obtained were let. The only evidence relating to prices at which contracts were let was (1) Lysfjord's testimony that between May or June of 1952 and September of 1952 a "cut-throat competitive condition" existed (R. 678); (2) Lysfjord's testimony that prices on smaller jobs were "very, very competitive" from September of 1952 to the time of trial (R. 675-76); (3) Lysfjord's testimony that prices on larger jobs were "very, very high" (R. 676); and (4) Lysfjord's testimony about the Airport Junior High School job and his 50

percent mark-up bid (R. 677). But none of that testimony is sufficiently certain to indicate what the prices actually were.

(b) There was no showing of the costs which plaintiffis would have sustained in the performance of such contracts. There was no showing of labor costs, material costs (other than acoustical tile), overhead expense, costs of obtaining additional financing, or such other costs and expenses as might have been incident to the operation of a larger enterprise.

(c) There was no showing that plaintiffs had the ability to manage a larger business in such manner as to realize a profit. There was not even a showing that any acoustical contractor (no matter how efficient) made a profit on a contract or contracts that plaintiffs did not get. (We do not concede that such a comparison would have been appropriate here, *Wolfe v. National Lead Co., supra,* but its absence is noted to demonstrate how completely devoid of data—relevant or otherwise—the record is.)

(d) Plaintiffs' generalized and unsupported remarks about Downer's profits in a prior period are wholly irrelevant to whether *plaintiffs* would have made a profit during the period in question (either the proper period or the period covered by the court's erroneous instructions).

(e) The only specific evidence bearing on the question whether plaintiffs would have made a profit on additional business is that plaintiffs made net profits of 5 per cent of gross sales in 1952, 11 per cent of gross sales in 1953, and 5 per cent of gross sales in 1954 (Ex. L). That information is admittedly relevant, but absent information regarding the extent to which additional work would have increased plaintiffs' costs or the contract prices at which additional work might have been obtained, such information

cannot support an inference that additional work would have been handled at a profit.

Third, there was no showing that plaintiffs lost any business because they could not buy tile from Flintkote or that they would have obtained any additional business if they had been able to buy tile from Flintkote.

In the nature of things, since plaintiffs did not have any history as an established business using Flintkote acoustical tile, plaintiffs could not show that being unable to purchase acoustical tile from Flintkote had caused any actual diminution in either the volume of their business or the profits resulting therefrom.

Plaintiffs' principal evidence regarding business lost was as follows: (1) they thought that they could have sold a carload of acoustical tile each month during the calendar year 1952 (one and one-half carloads per month in 1953, and two carloads per month in 1954) if they had been able to obtain Flintkote tile on a direct basis (Exs. 38 and 39); (2) they thought that each of them could have sold the same monthly quantity of acoustical tile in their own business as that which they had been selling for the Downer company (Ex. 43) (note that the quantities in (1) and (2) are not the same); whereas (3) they actually only sold tile costing them $66,756.95 (R. 1195), about 9½ carloads, in addition to the car and one-half of Flintkote tile, for a total of about 11 carloads in 40 months.

There was nothing in the evidence to show that plaintiffs were qualified to estimate the amount of business which they might have done (see pages 110-12, *supra*); or that plaintiffs' opinions were based on any factual data whatsoever; or that their "opinions" were anything other than speculation and wishful thinking. The entire basis

of plaintiffs' opinions regarding business they might have done was neatly summarized by Lysfjord when he said (R. 628): "I can't see any reason in my mind that I shouldn't be able to do as well for myself as working for somebody else." The fallacy of that reasoning is readily apparent when one considers that thousands of new business ventures fail every year—and it may be assumed that many of the persons who embarked on those enterprises had been reasonably successful when "working for somebody else" in the same field.

There was no showing that plaintiffs' success at the Downer company as salesmen was the result of anything other than that the Downer company was a well-established acoustical contracting firm having an excellent reputation in the business (R. 1134-36). There was no showing that the acoustical contracting market during the period in question was comparable to the market during plaintiffs' employment by the Downer company. There was no showing that, even assuming a comparable market, plaintiffs would have enjoyed the same measure of success representing their own new, small, underfinanced enterprise that they had representing the Downer company.

The only testimony touching upon any adverse effect of plaintiffs' inability to purchase tile from Flintkote on plaintiffs' business is that of Waldron as follows:

> "Q. Now, Mr. Waldron, after your source of supply of acoustical tile was terminated by The Flintkote Company, were you able to carry on your acoustical tile business? A. Not for some time.
>
> Q. Did you do any bidding after that date for some time and, if so, how long a time? A. We didn't do any bidding for a couple of months other than with the material we have had before.

Q. By the 'material you have had before,' do you mean the material you got in this first shipment of tile? A. Yes.

Q. Can you explain just how you did carry on after that termination with respect to your acoustical tile activities? A. The acoustical tile was curtailed, and later on, a month or two or three, we were able to line some materials from lumber yards and the E. J. Stanton people had some, the Harbor Plywood, and we were able to eventually get some.

However, the Harbor Plywood supply was not an AMA rated material, so it was limited to where we could put it, and any of this material we had to pay a premium of around 17 per cent to 20 per cent greater than we had paid before.

Q. Can you name some of these places where you bought this tile at that price? A. Yes, we bought from the Harbor Plywood people, E. J. Stanton people, and Louis A. Downer, acoustical contractor." (R. 270-71.)

Q. After your supply was terminated, were you able to continue doing business with your established general contractors in this area? A. Oh, no, their volumes were too great for us and we had no assurance of being able to supply a job.

Q. Can you explain that statement? I mean, why didn't you have any assurance of a supply? You were able to buy acoustical tile at enhanced prices, were you not? A. The bids, the bidding was difficult. Our markup, by the time we paid the 15 to 25 per cent, we would lose the job, because we were overpriced. That happened.

And then we couldn't be sure through the lumber yards of getting proper sizes of tile or proper delivery at that time.

Q. Could you be assured at the lumber yards or the other acoustical tile contractors, that they could or would supply the amount necessary for any substantial job, the amount required on a substantial job? A. The other acoustical contractors—

Q. You mentioned Louie A. Downer Company as one supply you had. And then referring to Louie A. Downer Company, could you depend on him to be there with the tile when the job was ready? A. No, not completely. He cooperated with us as best he could. But he had only a 12x12 tile, I believe, at that time. And most of the market jobs we were working in and wanted to work in with people we had been doing business were 24x24, and he couldn't supply that one at all.

Q. Well, let's take the lumber yards, do they carry stock on hands at all times— A. Very little.

Q. —sufficient to do a sizeable job? A. No, no, that would have to be arranged months ahead." (R. 274-75.)

Waldron's only statement that any work at all was lost was that ". . . we would lose the job, because we were overpriced. That happened." But Waldron did not advert to any specific instance when "That happened"; nor did he indicate what price plaintiffs bid, or the price at which the contract was awarded, or that plaintiffs would not have been "overpriced" even if they had been able to buy Flintkote tile on a direct basis.

There was no direct evidence that plaintiffs seriously attempted to obtain acoustical tile from another manufacturer on a direct basis or that tile could not be obtained except at an enhanced price from anyone other than Flintkote.

The direct evidence indicates that the increased tile cost was not the reason why plaintiffs were "overpriced" and that they might have been "overpriced" in any event. Plaintiffs testified that (when obtained on a direct basis) tile cost should be one-third of the gross contract price (R. 602, 624) and that their net profit should be 20 per cent of the gross contract price (Exs. 38 and 39). Presumably that was how they bid; and if they insisted on preserving that ratio of tile cost to contract price, the reflection of the increased tile cost would result in a bid substantially higher than a bid based on the lower direct basis tile cost (Downer's bid, for example). But on their own figures, plaintiffs did not need to preserve that ratio to make a profit. They paid 16 per cent more for tile than they would have paid Flintkote (R. 1195). 16 per cent of one-third of the gross contract price equals 5⅓ per cent of the gross contract price. Presumably plaintiffs' other costs were not affected by the increase in their tile cost. Therefore, on their own figures, plaintiffs (1) could have kept the same ratio of tile cost to contract price and increase the contract price 16 per cent, resulting in a net profit of 31⅓ per cent; or (2) could have kept the same calculated dollar profit per job as if their bid had been based on the lower tile cost (twice Downer's profit) by increasing the gross contract price by 5⅓ per cent; or (3) could have absorbed the increased tile cost and met Downer's prices, retaining a calculated net profit of 14⅔ per cent (4⅔ per cent more than Downer); or (4) could have cut Downer's price by 4⅔ per cent, retaining a calculated net profit of 10 per cent (equal to Downer's normal profit). (In the foregoing discussion 100 percent equals the gross contract price based on a bid of three times the tile cost on a direct basis. All percentage figures relate to that basis.) Thus, plaintiffs'

own figures show that if their bids were too high and they lost business because they were "overpriced", it was obviously their own fault, and was not traceable to increased tile costs resulting from their inability to purchase tile from Flintkote on a direct basis.

The only specific evidence of a job that plaintiffs failed to get or of the price at which a job was actually let and its relationship to costs was Lysfjord's testimony as follows:

> "A. I remember a school job called the Airport Junior High School, I believe. It was a job upwards of $60,000 or $70,000 worth of work, and we bid the job with the intentions of, if we were fortunate enough to get it, we would have enough profit in it to be worth while. By that I mean we had our mark-up somewhere around 50 per cent above our basic cost. And the contractor that was successful in getting it was about $200 or $300, or maybe $400, under our figure. So you can see that that particular job was quite high.
>
> Q. You checked that job, I mean the aabeta company checked the bid figures on that job? A. Yes, indeed." (R. 677.)
>
> * * * * * * * *
>
> "Q. You apparently had an assured source of supply when you put in that bid, didn't you? A. I would say we did." (R. 1212.)

Note that Lysfjord bid a mark-up of 50 per cent above his basic cost (presumably as enhanced by any increased cost of tile), whereas he had testified that a normal mark-up of 30 per cent should result in a net profit of 20 per cent of the gross contract price (R. 626-27), and note further that the successful contractor's bid was only about one-half of one per cent of the gross contract price lower than plaintiffs' bid. Thus plaintiffs were "overpriced"

on the only job they were specifically shown to have lost because they were too greedy, not because they could not buy tile from Flintkote. (And there was no showing that plaintiffs' greed would have been less if they could have obtained tile from Flintkote.)

Thus, it would seem that plaintiffs failed to get more business for one or a combination of the following reasons: (a) there was no more business to be done; (b) they didn't try to get more business; (c) although they could cut the price and still make a profit, no one would give them more business; or (d) they were greedy and did not get more business because they fixed their prices too high and free competition prevented them from getting more business. In any event, it should be clear that the evidence will not support a finding that plaintiffs lost any profits, or if they did, that such loss was proximately caused by their inability to purchase acoustical tile from Flintkote on a direct basis.

The foregoing discussion proceeds on the assumption, but without any concession, that plaintiffs' speculative estimates regarding their business prospects were properly admitted in evidence. If those estimates should have been excluded, it is even more apparent that there is no evidence to sustain a finding of the fact of injury through loss of profits.

It thus appears that there was evidence in the record which was sufficiently definite and certain to support a finding of the fact of injury in the form of two kinds of out-of-pocket expenses and to support a computation of the amount of damages sustained by reason of those injuries in any sum less than $3,514.75 (the San Bernardino expenses, category (1), and the increased cost of tile, category (2), during the calendar year 1952). On the

basis of the court's instructions on the damage period (which were incorrect, see pages 100-09, *supra*), the evidence would support an award of damages based on plaintiffs' out-of-pocket expenses in categories (1) and (2) of not more than $11,160.82, or, even accepting plaintiffs' obviously erroneous figures regarding the increased cost of acoustical tile, not more than $14,678.54. But the jury's verdict assessed plaintiffs' damages at $50,000, and it is thus apparent that the jury did not limit the award to damages for the injuries in categories (1) and (2).

The verdict must, then, have been based on an estimate of profits lost by reason of plaintiffs' inability to buy tile from Flintkote or on passion and prejudice. But both the fact and amount of lost profits could have been based only upon gratuitous speculation (either of plaintiffs or the jury). The verdict therefore cannot be permitted to stand.

> ". . . the basis of this judgment is nothing but the mere guess of an interested witness. Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way."
>
> *Central Coal & Coke Co. v. Hartman,* 111 Fed. 96, 102 (8th Cir., 1901).

> "The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts."
>
> *Ibid.*

It is submitted that to permit this verdict to stand would, as this Court said in *Wolfe v. National Lead Company, supra,* be to

> "give judicial blessing to a decision based upon speculation, surmise, and conjecture." (225 F. 2d at 433-34.)

D. The Court Erred in Allowing an Excessive Attorney's Fee.

(Specification of Error No. 14, p. 43.)

After the trial of this case, the court fixed the fee of plaintiffs' attorney, as provided by 15 U. S. C. A. §15, in the sum of $25,000 (R. 125-26). The matter of plaintiffs' attorney's fee had theretofore been submitted to the court on the basis of the petition for attorney's fees and costs (R. 105-108) and EXHIBIT A, Schedule of Time, appended thereto (R. 108-13), and memoranda of points and authorities submitted by both plaintiffs and defendant. No evidence other than that contained in the petition and exhibit was adduced in connection with the fixing of the attorney's fee. This Court has before it the same document, as the sole support for the award, as did the court below. No presumption of correctness, therefore, based on resolution of conflicts in evidence, or questions of relative credibility of witnesses, attaches to the trial court's decision. It is submitted that under the circumstances the fee of $25,000 awarded by the court was excessive.

It is provided by statute that the "person injured" shall recover "the cost of suit, including a reasonable attorney's fee."

15 U. S. C. A., §15.

The fee, therefore, is awarded to the successful plaintiff, not to his counsel. Hence there is no limitation, statutory or otherwise, on the private fee arrangements that a plaintiff may make with his counsel. But there is a limitation on the amount which may be awarded under the statute. The standard has been set by Congress: "a reasonable attorney's fee." A "reasonable" fee is generally held to be measured by the standard of fees ordinarily charged in the particular locality for the services rendered.

The amount to be allowed as attorney's fees may be determined from evidence admitted for that express purpose, the record of the trial, and the expert knowledge of such matters possessed by the trial judge. The award, of course, should take into consideration the result achieved as well as the work and skill of counsel.

But there are certain circumstances which clearly are not relevant factors to be considered in determining the amount of the award: (1) the amount may not be computed on the basis of a contingent fee; (2) the success or result achieved is the success reflected in the amount of actual damages, that is, as determined by the verdict, and not as trebled; (3) the usual yardstick of fees may not be disregarded in antitrust cases and an enhanced fee awarded upon any theory that such suits are of a unique character; (4) the fee should not be determined by application of a different standard simply because it is in effect to be paid by defendant rather than by counsel's client.

In short, in the matter of awarding attorney's fees, the court should be vigilant in detecting claims for exorbitant attorney's fees, and should strive to avoid what may be properly characterized as "vicarious generosity." Not

only does the award of an unreasonable attorney's fee inflict an additional and unauthorized penalty upon a defendant, but as said in *Milwaukee Towne Corp. v. Loew's, Inc., supra,* at page 570 of 190 F. 2d, which language was quoted with approval in the *Brookside* case:

> "And we are disturbed because in our sober judgment this exorbitant allowance, if it should become a precedent, is calculated to bring both the bar and the bench into public disrepute. More than that, the possibility that the anti-trust laws might develop into a racketeering practice should not be enhanced by the allowance of exorbitant and unreasonable attorney fees. It should not be made more profitable than it is for a person to become the victim of a conspiracy in restraint of trade."

The basic principles with regard to fixing the allowance to plaintiffs for their attorney's fee find ample support in the following cases:

Milwaukee Towne Corp. v. Loew's, 190 F. 2d 561, 569-71 (7th Cir., 1951), *cert. denied,* 342 U. S. 909, 72 S. Ct. 303 (1952);

Straus v. Victor Talking Mach. Co., 297 Fed. 791, 805-06 (2d Cir., 1924);

Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846, 858-59 (8th Cir), *cert. denied,* 343 U. S. 942, 72 S. Ct. 1035 (1952);

Bordonaro Bros. Theatres v. Paramount Pictures, 113 F. Supp. 196 (W. D. N. Y., 1953);

Cf. Dumas v. King, 157 F. 2d 463, 466 (8th Cir., 1946);

Hutchinson v. William C. Barry, 50 F. Supp. 292, 296-98 (D. Mass., 1943).

Applying the rules set out in the authorities discussed above to the situation before us as disclosed by counsel's petition, it becomes immediately apparent that the award of $25,000 as counsel fees was excessive.

There is no basis either in reason or authority by which the fee allowed can properly be enhanced, because counsel's arrangement with his own clients was for a contingent fee. It may well be that the allowance should be taken into account as between plaintiffs and their counsel, but the statutory award made here does not abrogate any private arrangement that plaintiffs and their counsel may have seen fit to make.

By stipulation, the fact and amount of the payment made by the other persons originally named herein as defendants were withheld from the jury; but, depending on the court's decision regarding the proper application of the $20,000 payment, the recovery, before trebling, must be taken to be either $30,000 or $43,333.

Counsel's petition sets out 515½ hours of his time spent in the preparation and trial of the case, and a total of 21 days in court. His opinion that these services were of the value of $40.00 per hour for office work and $250.00 per day in court seems on the high side, but we are prepared to agree that $30.00 to $40.00 per hour and $200.00 to $250.00 for a court day for the services of senior members of the bar could probably be supported by testimony if local attorneys were called to give expert evidence. The court, however, is entitled to bring to bear its own judgment on these matters and would not be bound by these estimates.

One thing, however, must be borne in mind. There were only two days during the entire trial of this case

which were in fact full court days (that is, occupying both morning and afternoon sessions). There is some validity, we quite agree, to making a charge for a full court day if the attorney's time is so interrupted that no other productive work can be done on that day. But the *"per diem"* is put at an amount which presumably gives full compensation for the entire day's service and it seems quite untenable, as counsel has done here, to seek a full court day's allowance on each of the 15 days when only the afternoons were taken up and at the same time claim additional hourly compensation for the morning hours not spent in court. At least three effective working hours were available on each of those mornings, and if a full *per diem* is to be allowed for each court day, it seems too clear for argument that the hourly total should thereby be reduced by at least 15x3, or 45 hours. It may also be suggested with propriety that there should be a further reduction to take into consideration that at least a substantial part of the services performed in the early stages of this case related to the prosecution of the case against defendants other than Flintkote.

Taking all of the factors into account, it is submitted that (assuming the judgment is affirmed) an allowance between $15,000.00 and $20,000.00 would be entirely adequate, and that anything more is unreasonable.

Of course, if the judgment is reversed on any ground, the award of attorney's fee should be set aside.

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d 721, 727 (10th Cir. 1955.)

IV.

The Court Erred in Its Disposition of the Sum Paid to Plaintiffs by Former Defendants in Exchange for a Dismissal and a Covenant Not to Sue.

(Specification of Error No. 15, p. 43.)

This action was originally commenced against several defendants, in addition to The Flintkote Company (R. 3). Subsequent to the commencement of the action but prior to the trial of the case, all of the originally-named defendants other than The Flintkote Company paid to plaintiffs the sum of $20,000.00 in exchange for a covenant not to sue and a dismissal of the action against them (R. 113). The fact of the payment of the $20,000.00 and the effect of that payment as between plaintiffs and Flintkote were withheld from the jury and submitted to the court upon an oral stipulation, later formalized into a written stipulation, as follows:

> "It Is Hereby Stipulated that the parties originally named as defendants herein, other than The Flintkote Company, paid to plaintiffs the sum of $20,000 upon delivery to said defendants of a covenant not to sue, dated July 31, 1953, copy of which was attached to defendant's Memorandum of Points and Authorities on Effect of 'Covenant Not to Sue' filed herein on May 4, 1955.
>
> "Prior to the trial of the above-action, plaintiff and defendant The Flintkote Company agreed that said defendant would not offer before the jury evidence of said payment or of the execution of said document, and would withdraw its request for defendant's proposed Instruction No. 49.
>
> "This was done on the understanding that without prejudice to the rights and objections of either party and without prejudice to the right of either party to

appeal from or seek reconsideration of an adverse ruling, the Court shall determine, with the same effect, all issues that would have been presented if evidence of said payment, and said document, had been offered by defendant before the jury, and if said Instruction No. 49 had been proposed by defendant.

"It is expressly understood that any and all objections, jurisdictional or otherwise, to said offers in evidence or to proposed Instruction No. 49, and any and all arguments relating to the effect of said payment, are preserved unimpaired to plaintiffs, despite this stipulation, except the objection and argument that defendant waived any rights it otherwise would have had by not attempting to offer before the jury evidence of said payment or said document, or by withdrawing its request for said proposed Instruction No. 49." (R. 113-114.)

No evidence other than the covenant not to sue (R. 95-103) and the stipulation reproduced above was submitted to the court in connection with its determination of the effect of the covenant not to sue and the payment of the $20,000.00, so here again no presumption of correctness, based on resolution of conflicts in evidence or questions of credibility of witnesses, attaches to the trial court's decision. The judgment provided that:

". . . the defendant shall have as a credit against the portion of this judgment relating to damages in the sum of $150,000 the sum of $20,000 heretofore received by plaintiffs in these proceedings pursuant to the terms of a covenant not to sue between plaintiffs and other parties formerly defendants in this case" (R. 126-27).

In this connection the court also issued its Memorandum of Decision (R. 116-124),

Lysfjord v. Flintkote Company, 135 F. Supp. 672 (S. D. Cal. 1955).

It is submitted that the court erred in its determination of the effect of the $20,000.00 paid, and that in fact the $20,000.00 offset the actual damages suffered by plaintiffs and should have been deducted from the verdict prior to the trebling thereof by the court.

Co-conspirators are of course joint tort-feasors and it is settled that private actions under the antitrust laws sound in tort. See, *e. g.,*

Rector v. Warner Bros. Pictures, 102 F. Supp. 263, 264 (S. D. Cal. 1952).

The general rule on the effect of payments made by one joint tort-feasor to the injured person is stated in Section 885(3) of the Restatement of Torts, as follows:

> "Payments made by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment; the extent of the diminution is the amount of the payment made, or a greater amount if so agreed between the payor and the injured person."

See also,

Schumacher v. Rosenthal, 226 F. 2d 946 (7th Cir. 1955);

Southern Pacific Co. v. Raish, 205 F. 2d 389, 393 (9th Cir. 1953);

Pacific States Lumber Co. v. Bargar, 10 F. 2d 335, 337 (9th Cir. 1926).

The rule is usually stated to the effect that a plaintiff's damages are reduced *pro tanto* by any sums received from a joint tort-feasor. See, *e. g.*

Husky Refining Co. v. Barnes, 119 F. 2d 715, 716 (9th Cir. 1941);

McWhirter v. Otis Elevator Co., 40 F. Supp. 11, 13 (W. D. S. C. 1941).

It is thus clear that defendant is entitled to receive credit for the $20,000.00 heretofore paid by the former defendants in this case as consideration for the covenant not to sue. The issue is whether that credit should be allowed against the judgment after trebling the jury's verdict or against the verdict before trebling.

The statute under which this action was brought reads in pertinent part as follows:

> "Any person who shall be injured in his business or property . . . may sue therefor . . . and shall recover threefold the damages by him sustained . . ."

The word "damages" in the above quotation refers of course to actual damages sustained by the person injured.

Cape Cod Food Products v. National Cranberry Ass'n, 119 F. Supp. 900, 910-11 (D. Mass. 1954).

The real question, then, is the extent to which plaintiffs were damaged in light of their receipt of the $20,000.00. Flintkote contends that (accepting the jury's verdict) plaintiffs' damages were only in the sum of $30,000.00, and that only that sum should have been trebled by the court.

Defendant's position is supported by clear analogy by *Clabaugh v. Southern Wholesale Grocers' Ass'n,* 181 Fed. 706 (N. D. Ala. 1910).

That was an action for treble damages under the anti-trust laws. An action had previously been brought in the state court based upon the same allegedly wrongful acts against the president of the defendant association for alleged wrongful interference with plaintiff's business. Plaintiff settled the state suit while the federal action was pending. The federal court granted a motion by the defendant association for a directed verdict, relying upon the rule that the association and its president were joint tort-feasors and that a party wronged by joint tort-feasors was entitled to but one satisfaction for his injuries. The court found that the settlement effected in connection with the state court suit was intended to be in full satisfaction of plaintiff's damages. The following are significant portions of the opinion:

> ". . . Mr. Clabaugh had no right to sue anybody else, even though he attempted to reserve that right in his agreement with Mr. Van Hoose, because, having once been paid in full for his damages, he had not the legal right to make any agreement which would give him a right to sue any other person for the same damages, . . ." (p. 707.)
>
> * * * * * * * *
>
> "There is one other thing which I should have said. The act of Congress under which this suit is brought provides for the recovery, not of single damages, but threefold damages; but the construction of that act by the Supreme Court in the case of *Montague & Co. v. Lowry*, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608, is to the effect that threefold damages are only recoverable when the plain-

tiff has a cause of action that would entitle the jury to award single damages. In other words, the function of the jury is to only render a judgment for actual damages, and the court then triples them; but if there is nothing to go to the jury for single damages, then the court has no jurisdiction to render any judgment for triple damages." (p. 708.)

Flintkote does not contend that the $20,000.00 was intended by any of the parties to the covenant not to sue to be in full satisfaction of plaintiffs' claims. It was clear, however, that the payment was intended as partial compensation for such damages as plaintiffs might have sustained by reason of the matters complained of in the first amended complaint in this action. The language of the covenant not to sue pertinent in this connection is as follows:

> "That the sum of Twenty Thousand Dollars ($20,000.00) paid herein to the covenantors as consideration for the execution of this covenant not to sue does not represent to covenantors and shall not be construed as full compensation for the alleged damages claimed to have been suffered by the covenantors in their original complaint and in their first amended complaint, but is only partial compensation therefore, and it is understood and agreed that the covenantors do not in any manner or respect waive or relinquish any claim or claims against any other persons, firms, or corporations than those expressly named and designated herein, . . ." (R. 99-100.)
>
> * * * * * * * *
>
> "That nothing herein set forth is intended to mean nor to be construed as any admission of liability on the part of any of the covenantees with respect to any of the matters alleged in the complaint and the first amended complaint." (R. 101.)

The aforesaid language is free from any uncertainty or ambiguity and it is clear that the $20,000.00 was intended to be and was partial compensation for such damages as plaintiffs might have sustained. It should follow that plaintiffs' damages were reduced *pro tanto* by $20,000.00 and that the jury's verdict should have been similarly reduced before the same was trebled by the court.

Conclusion.

The judgment of the District Court cannot stand.

It should be reversed and judgment should be entered for appellant since there was no evidence to justify the verdict.

In any event, a new trial should be granted because of the many prejudicial errors of the court below.

The damages awarded are grossly in excess of any amount supported by the record. In view of the great disparity between the evidence and the jury's award, the failure to grant a new trial was an abuse of discretion.

Respectfully submitted,

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May 25, 1956.